No. 15-628

Title:	Bassam Yacoub Salman, Petitioner
	v.
	United States
Docketed:	November 13, 2015
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(14-10204)
Decision Date:	July 6, 2015
Rehearing Denied:	August 13, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Nov 10 2015	Petition for a writ of certiorari filed. (Response due December 14, 2015)
Dec 14 2015	Brief of respondent United States in opposition filed.
Dec 21 2015	Reply of petitioner Bassam Yacoub Salman filed.
Dec 30 2015	DISTRIBUTED for Conference of January 15, 2016.
Jan 19 2016	Petition GRANTED limited to Question 1 presented by the petition.
Feb 9 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 6, 2016.
Feb 9 2016	The time to file respondent's brief on the merits is extended to and including August 1, 2016.
Apr 27 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 6 2016	Joint appendix filed. (Statement of costs filed)
May 6 2016	Brief of petitioner Bassam Y. Salman filed.
May 13 2016	Brief amicus curiae of The NYU Center on the Administration of Criminal Law in support of neither party filed.
May 13 2016	Brief amicus curiae of Securities Industry and Financial Markets Association in support of neither party filed.
May 13 2016	Brief amici curiae of National Association of Criminal Defense Lawyers, and the New York Council of Defense Lawyers filed.
May 13 2016	Brief amicus curiae of Mark Cuban filed.
May 13 2016	Brief amicus curiae of Daryl M. Payton filed.
May 13 2016	Brief amicus curiae of Cato Institute filed.
Jul 13 2016	SET FOR ARGUMENT on Wednesday, October 5, 2016.
Jul 22 2016	Record requested from U.S.C.A. 9th Circuit.
Jul 23 2016	Record received from U.S.C.A. 9th Circuit is electronic and located on PACAER.
Jul 23 2016	Record received from U.S.D.C. of California Northern District of San Francisco is electronic. This record is SEALED.
Jul 28 2016	Record received from U.S.D.C. Northern District of California, this record is SEALED. 1 Box.
Aug 1 2016	Brief of respondent United States filed.

Aug 8 2016	Brief amicus curiae of Richard D. Freer filed. (Distributed)
Aug 8 2016	Brief amicus curiae of Occupy the SEC (OSEC) filed. (Distributed)
Aug 9 2016	CIRCULATED
Aug 31 2016	Reply of petitioner Bassam Yacoub Salman filed. (Distributed)
Oct 5 2016	Argued. For petitioner: Alexandra A. E. Shapiro, New York, N. Y. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.
Dec 6 2016	Adjudged to be AFFIRMED. Alito, J., delivered the opinion for a unanimous Court.
Jan 9 2017	JUDGMENT ISSUED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Alexandra A.E. Shapiro Counsel of Record	Shapiro Arato LLP 500 Fifth Avenue, 40th Fl. New York, NY 10110 ashapiro@shapiroarato.com	(212) 257-4881
Party name: Bassam Yacoub Salman		
John D. Cline	Law Office of John D. Cline 235 Montgomery Street Suite 1070 San Francisco, CA 94104 cline@johndclinelaw.com	(415) 662-2260
Party name: Bassam Y. Salman		
Attorneys for Respondent:		
Ian Heath Gershengorn Counsel of Record	Acting Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	(202) 514-2217
Party name: United States		
Michael R. Dreeben	Deputy Solicitor General Department of Justice Washington, DC 20530 michael.r.dreeben@usdoj.gov	(202) 514-2201
Party name: United States		
Other:		
Anthony S. Barkow	Jenner & Block LLP 919 Third Ave. New York, NY 10022 abarkow@jenner.com	(212) 891-1600
Party name: The NYU Center on the Administration of Criminal Law in support of neither party		
Bradley Joseph Bondi	Cahill Gordon & Reindel 80 Pine Street	(212) 701-3000

New York, NY 10005
bbondi@cahill.com

Party name: Cato Institute

Meir Feder | Jones Day | (212) 326-3755
222 East 41st Street
New York, NY 10017
mfeder@jonesday.com

Party name: National Association of Criminal Defense Lawyers, and the New York Council of Defense Lawyers

Ralph C. Ferrara | 1001 Pennsylvania Avenue, NW | (202) 416-6800
Suite 600 South
Washington, DC 20004
rferrara@proskauer.com

Party name: Mark Cuban

Sean Hecker | Debevoise & Plimpton LLP | (212) 909-6000
919 Third Avenue
New York, NY 10022
Shecker@debevoise.com

Party name: Daryl M. Payton

Carter G. Phillips | Sidley Austin LLP | (202) 736-8000
1501 K Street, N.W.
Washington, DC 20005
cphillips@sidley.com

Party name: Securities Industry and Financial Markets Association in support of neither party

Sarah M. Shalf | Emory Law School | (404) 712-4652
Supreme Court Advocacy Project
1301 Clifton Road
Atlanta, GA 30322
sarah.shalf@emory.edu

Party name: Richard D. Freer

Akshat Tewary | 1974 State Route 27 | (732) 287-0080
Edison, NJ 08817
info@tewary.com

Party name: Occupy the SEC (OSEC)

15-No. 628

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In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St., Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

2. Can failure to investigate suspicious circumstances, without more, constitute the "deliberate actions" to avoid knowledge that this Court found necessary to establish willful blindness in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011)?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Bassam Yacoub Salman and Respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Bassam Yacoub Salman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion addressing the first question presented (App. 1 17) is reported at 792 F.3d 1087. The court of appeals' opinion addressing the second question presented (App. 18-25) is unreported. The district court's opinions denying petitioner's motion for release pending appeal (App. 26-33) and denying his motion for new trial (App. 34-52) are unreported.

JURISDICTION

The court of appeals entered judgment on July 6, 2015. App. 1. The court denied a timely petition for rehearing en banc on August 13, 2015. App. 53. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

INTRODUCTION

In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the Second Circuit declared that the personal benefit to the insider necessary for an insider trading conviction requires "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Solicitor General filed a petition for writ of certiorari. In the petition, the Solicitor General highlighted the conflict between *Newman* and the Ninth Circuit's decision in this case and emphasized the importance of the Second Circuit's decision to the financial markets and the investing public. The respondents argued in opposition that *Newman* presented a poor vehicle for resolving the definition of "personal benefit," because the Second Circuit had rested its decision on an independent ground (the defendants' lack of knowledge of any personal benefit)--so even a ruling in the government's favor would not change the outcome. The Court denied the government's petition. *United States v. Newman*, No. 15-137 (U.S. Oct. 5, 2015).

This case presents the ideal vehicle for resolving the important question on which the Solicitor General sought review in *Newman*. Here, unlike in *Newman*, resolution of the question is indisputably outcome-determinative. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses. But if there must be "an exchange that is objective, consequential, and represents at

least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange here between the insider and the tippee.

This case also presents an excellent vehicle for resolving a second question that has fractured the lower courts: the showing necessary for a willful blindness instruction following this Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).[1] In *Global-Tech*, the Court held that willful blindness exists only when the defendant takes "deliberate actions" or "active steps" to avoid knowledge. *Id.* at 2070. Following *Global-Tech*, the Seventh Circuit has held that a willful blindness instruction "should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity." *United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015). Other circuits have revised their pattern jury instructions to reflect the *Global-Tech* "deliberate actions" requirement. But the Second, Eighth, and Ninth Circuits adhere to the position that a failure to investigate suspicious circumstances suffices to establish willful blindness, and the First, Fifth, and Eleventh Circuits have approved instructions that omit the "deliberate actions"

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[1] The lower courts in this case used the phrase "deliberate ignorance" to describe the instruction at issue. Other courts have used the terms "conscious avoidance" and "willful blindness." We use "willful blindness," because that is the phrase the Court adopted in *Global-Tech*.

requirement. Because it is undisputed that Salman, a remote tippee, took no action to avoid knowledge, but merely failed to investigate the source of stock tips he received from the insider's immediate tippee, this case affords the Court an opportunity to clarify *Global-Tech* and to resolve this split.

STATEMENT OF THE CASE

The grand jury indicted petitioner Bassam Salman on four substantive counts of insider trading and one count of conspiring to engage in insider trading. ER 311.[2] The charges rested on the theory that Salman was a remote tippee. The government alleged that Citigroup investment banker Maher Kara passed confidential information to his brother Mounir ("Michael") Kara, who was not an insider; that Michael passed the information to Salman, in the form of stock recommendations; and that Salman traded on the recommendations through an account that he shared with his brother-in-law Karim Bayyouk.

To prove its case against Salman, the government struck plea deals with Maher and Michael Kara. Maher testified that he provided inside information to Michael on several occasions, but he did not say that he discussed stocks with Salman, and he denied knowing that Michael was passing the inside information on to others. ER 246. Michael testified that he told Salman that Maher was the source of the recommendations, *e.g.*, ER 193-96, 223-26, 232-33, but he was heavily impeached

[2] "ER" refers to the Excerpts of Record filed in the court of appeals.

and his testimony on this point was uncorroborated. The government also presented what it argued was circumstantial evidence of Salman's knowledge, including the fact that he traded through an account in Bayyouk's name, rather than in his own name.

I. THE "PERSONAL BENEFIT" TO MAHER KARA.

Among the elements necessary to convict a remote tippee such as Salman of insider trading are (1) that the insider (here, Maher Kara) personally benefitted from the disclosure of confidential, material, nonpublic information, and (2) that the defendant tippee (Salman) knew that the insider had personally benefitted from the disclosure. *E.g.*, App. 58-59 (district court's jury instruction). The district court instructed the jury, without objection, that "personal benefit" to the insider included "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." App. 61.

Consistent with this understanding of "personal benefit," Maher Kara testified that in 2002 he began secretly sharing with Michael confidential information he learned at Citigroup. At first, Maher sought Michael's assistance in understanding the biotech industry Later, Michael began to press him for information, and Maher reluctantly provided it, hoping that Michael was not using the information to trade. Finally, under continuing pressure from Michael, Maher provided him with confidential information knowing that Michael would trade--even though Michael swore on his daughter's life that he

would not. ER 239, 250-51. Maher provided this information, he testified, to get Michael off his back. ER 240-41. Maher explained: "The way that I thought I was helping myself was just by getting him off my back, and fulfilling whatever needs he had." ER 240; *see* T. 447-49 (Maher acted to help Michael and to benefit himself by getting Michael off his back).

Shortly after Salman filed his reply brief in the court of appeals, the Second Circuit decided *Newman*. *Newman* (in the government's words) "crafted a new, stricter personal benefit test."[3] The Second Circuit noted that it had previously defined "personal benefit" to include "the benefit one would obtain from simply making a gift of confidential information to a trading relative or a friend"--the same standard applied in Salman's case. *Newman*, 773 F.3d at 452. But the court imposed an important limit on that standard:

> This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or

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[3] *United States v. Newman*, No. 15-137, Petition for a Writ of Certiorari at 18 ["Government *Newman* Petition"]; *see also United States v. Newman*, No. 13-1837 (2d Cir.), Petition of the United States of America for Rehearing and Rehearing *En Banc* at 9 (filed Jan. 23, 2015, Doc. 279) (*Newman* "constricted" the existing understanding of "personal benefit" and gave the phrase a "narrow definition"); *id.*, Brief for the Securities and Exchange Commission as Amicus Curiae Supporting the Petition of the United States for Rehearing or Rehearing En Banc at 13 (filed Jan. 29, 2015, Doc. 298) (referring to *Newman*'s "narrowed personal benefit standard").

> social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* [*v. SEC*, 463 U.S. 646 (1983)] suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient," *see* 463 U.S. at 664, we hold that such an inference is impermissible in the absence of proof of a *meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.*

Id. (emphasis added).

Applying this standard, *Newman* found the evidence of personal benefit insufficient. One of the insiders had received "career advice" in exchange for confidential information, and the other merely had a "casual acquaintance[]" with his tippee. *Id.* at 453. Neither participated in an "exchange that [was] objective, consequential, and represent[ed] at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Second Circuit similarly found the evidence insufficient that the defendants knew the insiders were personally benefitting from

disclosure of the confidential information. *See id.* at 453-54. For both of these reasons, the court reversed both the substantive insider trading counts and a conspiracy count. *See id.* at 455.

With leave of the court of appeals, Salman filed a supplemental brief arguing that the evidence of personal benefit to Maher Kara (and Salman's knowledge of the personal benefit) was insufficient under *Newman*. Although Maher's testimony established that he "ma[de] a gift of confidential information to a trading relative," there was no evidence that he engaged in an "exchange [with Michael] that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. Maher received nothing from disclosing the confidential information to Michael except the scant comfort of getting Michael off his back. That "benefit" is not "objective"; it is not "consequential"; and it does not "represent at least a potential gain of a pecuniary or similarly valuable nature." It is therefore insufficient to satisfy the "personal benefit" element of an insider trading offense, as interpreted in *Newman*.

The Ninth Circuit panel (in a published opinion authored by visiting Judge Rakoff) declined to follow the *Newman* requirement that the government prove that the sibling relationship between Maher Kara and Michael Kara "generate[d] an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." App. 15 ("To the extent *Newman* can be read to go so far, we decline to follow

it."). Instead, based on its reading of *Dirks v. SEC*, 463 U.S. 646 (1983), the panel found it sufficient if the government proved that Maher Kara "'ma[de] a gift of confidential information to a trading relative or friend.'" App. 16 (quoting *Dirks*, 463 U.S. at 664) (emphasis omitted). Because the government met this burden (construing the evidence in the light most favorable to the verdict), the panel affirmed Salman's conviction. App. 16-17

II. THE WILLFUL BLINDNESS INSTRUCTION.

Although the government contended that Salman actually knew Maher Kara was the source of Michael's stock recommendations, it nonetheless requested a willful blindness instruction. At the pretrial conference, the government appeared to recognize that willful blindness requires the defendant to take active steps to avoid knowledge. It urged the district court to await the evidence at trial before deciding whether to give the instruction. The government argued:

> If the conversation between Mr. [Michael] Kara and Mr. Salman is: I have a great tip for you, and Mr. Salman says: Don't tell me where that came from, I don't want to know, that's the equivalent of willfulness. I do think there are facts that could be developed at the trial that would support this instruction.

ER 277.

At trial, however, the government presented no evidence that Salman asked Michael not to tell him the source of his stock recommendations, as the government had posited at the pretrial conference, or took other "deliberate actions" or "active steps" to avoid knowledge that Maher was the source of Michael's recommendations, as this Court required in *Global-Tech*. Instead, the government relied solely on the *absence* of action--Salman's failure to "ask[] questions" about Michael's recommendations. Doc. 244 at 2; *see* ER 73-75 (government argues that failure to investigate constitutes "deliberate action" under *Global-Tech*).

Salman objected to the deliberate ignorance instruction, because the government had not established a factual predicate for it. Doc. 156 at 4-6; ER 132-37, 256-60. Of particular significance, defense counsel declared: "There will be no evidence that Mr. Salman *did* anything to deliberately avoid learning of any illegality. [T]here will not be any evidence that Mr. Salman took *any deliberate* actions to avoid learning the truth." ER 259-60 (emphasis in original); *see* ER 136-37 (same). The district court overruled these objections, *e.g.*, App. 28-32, 44-46, and gave the willful blindness instruction, App. 60.

On appeal, Salman contended that the district court erred in giving the willful blindness instruction, because he did not take "deliberate actions" or "active steps" to avoid knowledge, as *Global-Tech* requires. The Ninth Circuit rejected Salman's contention. The court of appeals held that "at least under circumstances where a reasonable person would make further inquiries, '[a] failure to

investigate can be a deliberate action.'" App. 24 (quoting *United States v. Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013)). The panel concluded that a reasonable person in Salman's position would have sought to discover the source of Michael Kara's information, and thus it found the evidence sufficient to warrant a willful blindness instruction. App. 24-25.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to decide the two important questions this case presents, both of which have produced circuit splits: the nature of the personal benefit an insider must receive for an insider trading offense, and whether inaction--a mere failure to investigate--constitutes the "deliberate action" necessary for willful blindness.

I. PERSONAL BENEFIT.

1. In its petition for a writ of certiorari in *Newman*, the government argued that the *Newman* personal benefit definition "cannot be reconciled with *Dirks*," "created a conflict with circuits that have faithfully applied *Dirks*," and threatened to "hurt market participants, disadvantage scrupulous market analysts, and impair the government's ability to protect the fairness and integrity of the securities markets." Government *Newman* Petition at 14-15. In its reply, the government added that

Newman "created an upheaval in insider-trading law by rewriting the settled test announced in" *Dirks*.[4]

Addressing the conflict in the circuits on the personal benefit issue, the government cited and discussed Salman's case. *Id.* at 22-24; Government *Newman* Reply at 4-5. It declared that "[t]he Ninth Circuit . rejected the novel personal benefit test fashioned by" the Second Circuit in *Newman*. *Id.* at 23. The government noted that the Seventh Circuit decision in *SEC v. Maio*, 51 F.3d 623 (7th Cir. 1995), also conflicts with *Newman*. Government *Newman* Petition at 24-25.

The government stressed the importance of prompt intervention by this Court. It declared that "[d]elay in [overturning the *Newman* personal benefit standard] will result in continuing and serious harm." *Id.* at 26; *see* Government *Newman* Reply at 9 ("Absent this Court's intervention, the Second Circuit's redefinition of the personal-benefit standard will result in significant harm--restricting enforcement of the securities laws against culpable actors, spurring fraudulent activity, undermining the necessary work of legitimate analysts, depriving the financial community of guidance on how to comply with the law, and decreasing public confidence in the securities markets.").

2. In their oppositions to certiorari, the *Newman* respondents maintained that the case presented a poor vehicle for resolving the contours of the personal benefit necessary for insider trading.

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[4] *United States v. Newman*, No. 15-137, Reply Brief for the Petitioner, at 1 ["Government *Newman* Reply"].

As Newman put it, "[E]ven if this Court were to agree with the government that the Second Circuit misstated the type of evidence required to support an inference of a benefit, the decision dismissing the indictment on the independent ground that Newman did not know of any benefit would stand."[5] On October 5, 2015, this Court denied the government's petition in *Newman*. *United States v. Newman*, No. 15-137.

3. Contrary to the government's position in *Newman*, the Second Circuit's approach does not conflict with *Dirks*. The *Dirks* Court intended the "personal benefit" requirement to place a meaningful limitation on the otherwise broad sweep of the insider's fiduciary duty. As the Court put it: "[A] purpose of the securities laws was to eliminate use of inside information for personal advantage. Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by the tippee]." *Dirks*, 463 U.S. at 662 (quotation and citations omitted). The "personal benefit" limitation is particularly important in criminal cases, where liberty is at stake and where the prohibition against vague, judge-made laws is at its greatest. By

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[5] *United States v. Newman*, No. 15-137, Brief for Todd Newman in Opposition, at 2; *see id.*, Brief for Respondent Anthony Chiasson in Opposition, at 2 ("This Court's review would prolong this ordeal for no reason: The outcome of this case would be the same, whether or not this Court agreed with the Government's misreading of the decision below. That is because the question presented implicates just one of two independent grounds for the judgment below ").

reading the personal benefit requirement strictly, *Newman* ensures that the criminal sanction will be deployed only where it clearly applies.

4. Although the government misread *Dirks* in its *Newman* petition, it was correct that the personal benefit standard warrants prompt review by this Court. As the government observed, the square conflict between the Second Circuit on one hand and the Seventh and Ninth Circuits on the other "raises the specter of uneven enforcement of the securities laws against individuals who are all participating in the same nationwide capital markets." Government *Newman* Petition at 25. That "uneven enforcement" will only deepen as the courts of appeals choose between the Second Circuit's *Newman* approach on one hand and the Ninth Circuit's *Salman* approach on the other. As the government argued in *Newman*, this Court's review "is urgently needed to restore certainty and order" to the law of insider trading. Government *Newman* Reply at 12.

5. This case presents the identical issue on which the government sought review in *Newman*. Unlike in *Newman*, however, the issue is outcome-determinative here. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held, then Salman loses. Such a relationship plainly existed between Maher and Michael Kara, and Salman knew of that relationship. But if there must be "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable

nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange between Maher and Michael Kara and no evidence that Salman knew of such an exchange.

II. WILLFUL BLINDNESS.

The Court should also grant the writ to address a recurring question that has split the circuits: whether, following *Global-Tech*, a willful blindness instruction can be given where the government shows only that the defendant unreasonably failed to investigate suspicious circumstances, without taking any "deliberate actions" or "active steps" to avoid knowledge. The Ninth Circuit's conclusion that *inaction*--an unreasonable failure to investigate--constitutes "deliberate action" confuses deliberate indifference with willful blindness, contrary to *Global-Tech*, and it obliterates the careful distinction *Global-Tech* drew between willful blindness (which is tantamount to knowledge) and recklessness and negligence (which are not).

1. In *Global-Tech*, this Court defined the elements of willful blindness as follows: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take *deliberate actions* to avoid learning of that fact." 131 S. Ct. at 2070 (emphasis added). The Court emphasized the requirement that the defendant take "deliberate actions" to avoid learning the key fact. It declared: "We think these requirements give willful blindness an appropriately

limited scope *that surpasses recklessness and negligence.* Under this formulation, a willfully blind defendant is one who takes *deliberate actions* to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* at 2070-71 (emphasis added); *see, e.g., Macias*, 786 F.3d at 1062 ("An ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity.") (citing *Global-Tech*).

Global-Tech faulted the Federal Circuit for requiring only "deliberate indifference": "[I]n demanding only 'deliberate indifference' to that risk [that the disputed fact existed], the Federal Circuit's test does not require *active efforts* by an inducer to avoid knowing [the fact]." *Global-Tech*, 131 S. Ct. at 2071 (emphasis added).[6] The Court found the evidence sufficient to support a finding of willful blindness, because the jury could have inferred that the defendant "took *deliberate steps* to avoid knowing [the disputed] fact." *Id.* at 2072 (emphasis added).

2. The record is devoid of evidence that Salman took "deliberate actions" or "active steps" to

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[6] In a hearing shortly before trial, the district court and the government referred to the willful blindness instruction as a "deliberate indifference" instruction. ER 276. The district court used this formulation again when overruling Salman's objections to the instruction, ER 42, and again during the argument on Salman's motion for new trial, ER 76. The district court thus used the exact formulation that this Court rejected in *Global-Tech*.

avoid knowledge that Maher Kara was the source of Michael Kara's stock recommendations. The Ninth Circuit found the willful blindness instruction appropriate based on what it deemed Salman's unreasonable failure to investigate the source of Michael's tips. App. 23-24. But the court's ruling on this point cannot be squared with *Global-Tech*. If "deliberate indifference" is not enough for willful blindness, as *Global-Tech* held, then the court of appeals' even less demanding standard of an unreasonable failure to investigate cannot be enough.

The Ninth Circuit's approach collapses the distinction *Global-Tech* drew between recklessness and negligence on one hand and willful blindness on the other. This Court sought to "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Global-Tech*, 131 S. Ct. at 2070. A reckless defendant, according to the Court, "knows of a substantial and unjustified risk of wrongdoing." *Id.* at 2071. Recklessness corresponds to the first prong of the willful blindness standard--"subjective belie[f] that there is a high probability that a fact exists."

The second prong of willful blindness--the "deliberate actions" requirement--is thus what distinguishes the reckless defendant from the willfully blind defendant. A reckless defendant knows of a substantial risk that a fact exists and does nothing about it (or, put differently, is indifferent to it). A willfully blind defendant knows of a substantial risk (or "high probability") that a fact exists and takes deliberate actions to avoid

confirming the fact. But if inaction equals action, as the court of appeals concluded, then this Court's carefully drawn distinction vanishes; a reckless defendant who does not investigate the "substantial and unjustified risk of wrongdoing"--by definition, *every* reckless defendant--will be found willfully blind.

3. The Ninth Circuit's approach not only permits conviction of the merely reckless defendant, contrary to *Global-Tech*; it permits conviction based on the even lower negligence standard. The court of appeals found that a failure to investigate suspicious circumstances constitutes willful blindness "at least under circumstances where a reasonable person would make further inquiries." App. 24.[7] As this Court recently observed, a "'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct--*awareness* of some wrongdoing.'" *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 606-07 (1994) (emphasis added by

[7] By contrast, in *Macias* the Seventh Circuit left open the possibility that willful blindness could rest on a failure to investigate where there is "a ducking of responsibility, a violation of duty, and perhaps therefore the equivalent of taking evasive action to avoid confirming one's suspicions." 786 F.3d at 1063. But the court found that this possible standard had not been satisfied, because the defendant's "responsibilities to the drug cartel, which had only to do with facilitating the transmission of money from the United States to Mexico, did not require him to know how the money had been obtained. Having no need or duty to know, he was not acting unnaturally in failing to inquire." *Id.* at 1064. Even if the *Macias* "need or duty to know" standard is correct, it is far more stringent than the "reasonable person" standard that the Ninth Circuit embraced.

Elonis; internal quotation omitted)). By permitting a finding of willful blindness based on a defendant's unreasonable failure to investigate suspicious circumstances, the Ninth Circuit adopted the very negligence standard *Global-Tech* rejected and placed itself squarely in conflict with this Court.

4. The Ninth Circuit's decision also conflicts with the Seventh Circuit's decision in *Macias*. In that case, a former smuggler of illegal immigrants was recruited to smuggle drug profits from the United States to Mexico. He was indicted for participating in a drug distribution conspiracy. His defense was that he thought the money came from immigrant smuggling and did not know it represented drug proceeds. *See* 786 F.3d at 1061. The government sought and obtained a willful blindness instruction. On appeal, the Seventh Circuit found the instruction improper, because "[t]here is no evidence that suspecting he might be working for a drug cartel Macias took active steps to avoid having his suspicions confirmed." *Id.* at 1063; *see also, e.g., United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009) ("Failing to display curiosity is not enough; the defendant must affirmatively *act* to avoid learning the truth.") (quotation omitted; emphasis in original).

For the reasons stated in *Macias*, the willful blindness instruction should not have been given in this case. Even if Salman suspected that Michael Kara was obtaining stock tips from his brother Maher, there is no evidence that Salman "took active steps to avoid having his suspicions confirmed." *Macias*, 786 F.3d at 1063. The Ninth Circuit's

decision upholding the willful blindness instruction thus cannot be reconciled with *Macias*.

5. Other circuits have had varied responses to *Global-Tech*. The Third Circuit revised its criminal pattern jury instructions to include the "deliberate actions" requirement.[8] By contrast, the Second and Eighth Circuits have held, consistent with the Ninth Circuit's view in this case, that a failure to investigate satisfies the *Global-Tech* "deliberate actions" standard.[9] The First, Fifth, Sixth, and Eleventh Circuits have upheld willful blindness instructions that omit any requirement that the defendant take deliberate actions to avoid knowledge.[10]

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[8] Third Circuit Model Criminal Jury Instructions § 5.06 (2014); *see also* Pattern Criminal Jury Instructions of the Seventh Circuit, Instruction 4.10, Committee Comment (2012 ed.) (commentary to criminal pattern instructions notes that *Global-Tech* "provided an arguably narrower definition of the sort of willful blindness that equates to knowledge" and suggests that district judges "consider" whether to adopt the *Global-Tech* definition). The Eighth Circuit has also modified its pattern instruction to include the "deliberate actions" requirement. Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04 (2013). As noted in text, however, that court has recently found a failure to investigate to be consistent with *Global-Tech*.

[9] *See, e.g. United States v. Hansen*, 791 F.3d 863, 868-69 (8th Cir. 2015); *United States v. Whitman*, 555 Fed. Appx. 98, 104-06 (2d Cir.), *cert. denied*, 135 S. Ct. 352 (2014); *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 63 (2014).

[10] *United States v. Reichert*, 747 F.3d 445, 449-51 (6th Cir. 2014); *United States v. Grant*, 521 Fed. Appx. 841, 848 (11th Cir. 2013); *United States v. Denson*, 689 F.3d 21, 24-25 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013); *United States v. Brooks*, 681 F.3d 678, 702-03 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 836 (2013).

6. This case presents an ideal vehicle to resolve the division in the circuits over the *Global-Tech* "deliberate actions" requirement. As detailed above, Salman thoroughly preserved his objection to the willful blindness instruction. And the erroneous instruction was not harmless. The instruction "went to the heart and most hotly contested aspect of the case," *L.E. Myers*, 562 F.3d at 855 (willful blindness instruction not harmless): whether Salman knew that Maher Kara was the source of Michael Kara's stock recommendations.

This is not a case where evidence of actual knowledge was overwhelming. To the contrary, the government's actual knowledge theory "was beset by numerous and obvious problems." *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010) (willful blindness instruction not harmless). Most significantly, the only prosecution witness who provided direct evidence of Salman's knowledge--Michael Kara--had enormous credibility problems, ranging from the deal he had cut with the government to resolve his own criminal case to his prior inconsistent statements to his lies to Maher to delusions he suffered as a result of his mental illness and the drugs used to treat it. *See, e.g., United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (erroneous willful blindness instruction not harmless where "there was ample reason for the jury to question the credibility of the government's witnesses" on actual knowledge). Given Michael Kara's shredded credibility, and under the other circumstances of this case, the erroneous willful blindness instruction was not harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of
John D. Cline
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 662-2260
Counsel for Petitioner

November 2015

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BASSAM YACOUB SALMAN, AKA Bessam Jacob Salman, *Defendant-Appellant.*	No. 14-10204 D.C. No. 3:11-CR-00625-EMC-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted
June 9, 2015 – San Francisco, California

Filed July 6, 2015

Before: Morgan Christen and
Paul J. Watford, Circuit Judges, and
Jed S. Rakoff, Senior District Judge.*

Opinion by Judge Rakoff

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* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed a conviction by jury trial for conspiracy and securities fraud arising from an insider-trader scheme.

The panel held that the defendant did not waive a sufficiency of the evidence issue raised only in a supplemental brief because both parties had an opportunity to brief the issue and to address it at oral argument.

The panel held that the evidence was sufficient to support the conviction because it showed that an insider breached his fiduciary duty by disclosing information to a trading relative, and that the defendant knew of that breach at the time he traded on it. The panel declined to hold that under the Second Circuit's opinion in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the government also was required to prove that the insider disclosed the information for a personal benefit.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

John D. Cline (argued), Law Office of John D. Cline, San Francisco, California, for Defendant-Appellant.

Merry Jean Chan, Assistant United States Attorney (argued), Melinda Haag, United States Attorney, Barbara J. Valliere, Chief, Appellate Division, United States Attorney's Office, San Francisco, California, for Plaintiff-Appellee.

OPINION

RAKOFF, Senior District Judge:

Defendant-Appellant Bassam Yacoub Salman appeals his conviction, following jury trial, for conspiracy and insider trading. He argues that the evidence was insufficient to sustain his conviction under the standard announced by the United States Court of Appeals for the Second Circuit in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), which he urges us to adopt. We find that the evidence was sufficient, and we affirm.[1]

BACKGROUND

This case arises from an insider-trading scheme involving members of Salman's extended family. On

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[1] Salman raised several additional claims relating to the same conviction. Those claims are addressed in a separate memorandum disposition filed concurrently with this opinion.

September 1, 2011, Salman was indicted for one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and four counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. §§ 240.10b-5, 240.10b5-1 and 240.10b5-2, and 18 U.S.C. § 2. At trial, the Government presented evidence of the following:

In 2002, Salman's future brother-in-law Maher Kara joined Citigroup's healthcare investment banking group. Over the next few years, Maher began to discuss aspects of his job with his older brother, Mounir ("Michael") Kara. At first, Maher sought help from Michael, who held an undergraduate degree in chemistry, in understanding scientific concepts relevant to his work in the healthcare and biotechnology sectors. In 2004, when their father was dying of cancer, the focus of the brothers' discussions shifted to companies that were active in the areas of oncology and pain management. Maher began to suspect that Michael was trading on the information they discussed, although Michael initially denied it. As time wore on, Michael became more brazen and more persistent in his requests for inside information, and Maher knowingly obliged. From late 2004 through early 2007, Maher regularly disclosed to Michael information about upcoming mergers and acquisitions of and by Citigroup clients.

Meanwhile, in 2003, Maher Kara became engaged to Salman's sister, Saswan ("Suzie") Salman. Over the course of the engagement, the Kara family and the Salman family grew close. In particular,

Salman and Michael Kara became fast friends. In the fall of 2004, Michael began to share with Salman the inside information that he had learned from Maher, encouraging Salman to "mirror-imag[e]" his trading activity. Rather than trade through his own brokerage account, however, Salman arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk. Salman then shared the inside information with Bayyouk and the two split the profits from Bayyouk's trading. The brokerage records introduced at trial revealed that, on numerous occasions from 2004 to 2007, Bayyouk and Michael Kara executed nearly identical trades in securities issued by Citigroup clients shortly before the announcement of major transactions. As a result of these trades, Salman and Bayyouk's account grew from $396,000 to approximately $2.1 million.

Of particular relevance here, the Government presented evidence that Salman knew full well that Maher Kara was the source of the information. Michael Kara (who pled guilty and testified for the Government) testified that, early in the scheme, Salman asked where the information was coming from, and Michael told him, directly, that it came from Maher. Michael further testified about an incident that occurred around the time of Maher and Suzie's wedding in 2005. According to Michael Kara, on that visit, Michael noticed that there were many papers relating to their stock trading strewn about Salman's office.

Michael became angry and admonished Salman that he had to be careful with the information because it was coming from Maher. Michael testified that Salman agreed that they had to "protect" Maher and promised to shred all of the papers.

The Government further presented evidence that Maher and Michael Kara enjoyed a close and mutually beneficial relationship. Specifically, the jury heard testimony that Michael helped pay for Maher's college, that he stood in for their deceased father at Maher's wedding, and, as discussed above, that Michael coached Maher in basic science to help him succeed at his job. Maher, for his part, testified that he "love[d] [his] brother very much" and that he gave Michael the inside information in order to "benefit him" and to "fulfill[ ] whatever needs he had." For example, Maher testified that on one occasion, he received a call from Michael asking for a "favor," requesting "information," and explaining that he "owe[d] somebody." After Michael turned down Maher's offer of money, Maher gave him a tip about an upcoming acquisition instead.

Finally, the Government presented evidence that Salman was aware of the Kara brothers' close fraternal relationship. The Salmans and the Karas were tightly knit families, and Salman would have had ample opportunity to observe Michael and Maher's interactions at their regular family gatherings. For example, Michael gave a toast at Maher's wedding, which Salman attended, in which Michael described how he spoke to his younger brother nearly every day

and described Maher as his "mentor," his "private counsel," and "one of the most generous human beings he knows." Maher, overcome with emotion, began to weep.

The jury found Salman guilty on all five counts. Salman then moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on the ground, *inter alia*, that there was no evidence that he knew that the tipper disclosed confidential information in exchange for a personal benefit. The district court denied his motion in full.

Salman timely appealed, but did not raise a challenge to the sufficiency of the evidence in his opening brief. After he filed his reply brief, the United States Court of Appeals for the Second Circuit, in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), vacated the insider-trading convictions of two individuals on the ground that the Government failed to present sufficient evidence that they knew the information they received had been disclosed in breach of a fiduciary duty. *Id.* at 455. After the Second Circuit denied the Government's petition for panel rehearing and rehearing *en banc*, *United States v. Newman*, Nos. 13-1837, 13-1917, 2015 WL 1954058 (2d Cir. Apr. 3, 2015), Salman promptly moved for leave to file a supplemental brief arguing that the Government's evidence in the instant case was insufficient under the standard announced in *Newman*, which he urged this Court to adopt. We granted Salman's motion and gave the Government an opportunity to respond.

DISCUSSION

A.

The threshold question is whether Salman waived the present argument by failing to raise it in his opening brief on this appeal, even though he had raised it below and, after *Newman* was decided, promptly raised it in a supplemental brief that the Government responded to before oral argument. Ordinarily, we will not consider "'matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'" *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)). However, we make an exception to this general rule (1) for "good cause shown" or "if a failure to do so would result in manifest injustice," (2) "when it is raised in the appellee's brief," or (3) "if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Id.* (internal citation and quotation marks omitted).

The third exception applies here. As both parties have had a full opportunity to brief this issue and to address it at oral argument, the Government cannot complain of prejudice. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1072 (9th Cir. 2012) (finding no prejudice where parties had opportunity to brief the issue); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 n.4 (9th Cir. 2006) (considering issue not raised in opening brief where opponent had an opportunity to address

the issue at oral argument). Accordingly, we address Salman's claim on the merits.

B.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, when viewed in the light most favorable to the Government, the evidence was "'adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *United States v. Richter*, 782 F.3d 498, 501 (9th Cir. 2015) (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc)). Salman urges us to adopt *Newman* as the law of this Circuit, and contends that, under *Newman*, the evidence was insufficient to find either that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that Salman knew of such benefit.[2]

The "personal benefit" requirement for tippee liability derives from the Supreme Court's opinion in *Dirks v. S.E.C.*, 463 U.S. 646 (1983). *Dirks* presented an unusual fact pattern. Ronald Secrist, a

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[2] Another holding of *Newman* – that even a remote tippee must have some knowledge of the personal benefit (however defined) that the inside tipper received for disclosing inside information, *see Newman*, 773 F.3d at 450 – is not at issue here, because the jury was instructed that it had to find that Salman "knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounir ('Michael') Kara."

whistleblower at a company called Equity Funding, had contacted Raymond Dirks, a well-known securities analyst, after Secrist's prior disclosures to the Securities and Exchange Commission ("SEC") had gone for naught. *Id.* at 649 & 650 n.3. Secrist, for no other purpose than exposing the Equity Funding fraud, disclosed inside information about the company to Dirks, who in turn launched his own investigation that eventually led to public exposure of a massive fraud. *Id.* at 649-50. However, in the process of his investigation, Dirks openly discussed the information provided by Secrist with various clients and investors, some of whom then sold their Equity Funding stock on the basis of that information. *Id.* at 649. Upon learning this, the SEC charged Dirks with securities fraud, and this position was upheld by an SEC Administrative Law Judge and affirmed by the District of Columbia Circuit, after which certiorari was granted. *Id.* at 650-52.[3]

When the case came to the Supreme Court, Justice Powell, writing for the Court, began by noting that, whistleblowing quite aside, corporate insiders, in the many conversations they typically have with stock analysts, often accidentally or mistakenly disclose material information that is not immediately available to the public. *Id.* at 658-59. Thus, "[i]mposing

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[3] The Department of Justice, which successfully prosecuted the perpetrators of the fraud and viewed Dirks as a hero, took the unusual step of filing an amicus brief in the Supreme Court urging rejection of the SEC's theory. *Id.* at 648.

a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Id.* at 658. At the same time, the Court continued, "Nile need for a ban on some tippee trading is clear. Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Id.* at 659.

"Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure," *id.* at 662, for in that case the insider is breaching his fiduciary duty to the company's shareholders not to exploit company information for his personal benefit.[4] And a tippee is equally liable if "the tippee knows or should know that there has been [such] a breach," *id.* at 660, *i.e.*, knows of the personal benefit.

Of particular importance here, the Court then went on to define what constitutes the "personal benefit" that constitutes the breach of fiduciary duty. It

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[4] The same is true in a so-called "misappropriation" case, like the instant case, where the fiduciary duty is owed, not to the shareholders, but to the tipper's employer, client, or the like. *See United States v. O'Hagan*, 521 U.S. 642, 652-53 (1997).

would include, for example, "a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663. However, "*[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend.*" *Id.* at 664 (emphasis supplied).

The last-quoted holding of *Dirks* governs this case. Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the "gift of confidential information to a trading relative" that *Dirks* envisioned. *Id.* Indeed, Maher himself testified that, by providing Michael with inside information, he intended to "benefit" his brother and to "fulfill[ ] whatever needs he had." As to Salman's knowledge, Michael Kara, whose testimony we must credit on a challenge to the sufficiency of the evidence, testified that he directly told Salman that it was Michael's brother Maher who was, repeatedly, leaking the inside information that Michael then conveyed to Salman, and that Salman later agreed that they had to "protect" Maher from exposure. Given the Kara brothers' close relationship, Salman could readily have inferred Maher's intent to benefit Michael. Thus, there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that Salman knew as much.

Salman, however, argues that the Second Circuit in *Newman* interpreted *Dirks* to require more than this. Of course, *Newman* is not binding on us, and our

own reading of *Dirks* is guided by the clearly applicable language italicized above. But we would not lightly ignore the most recent ruling of our sister circuit in an area of law that it has frequently encountered.

The defendants in *Newman*, Todd Newman and Anthony Chiasson, both portfolio managers, were charged with trading on material non-public information regarding two companies, Dell and NVIDIA, obtained by a group of analysts at various hedge funds and investment firms. *Newman*, 773 F.3d at 442-43. The information came to them via two distinct tipping chains. The Dell tipping chain originated with Rob Ray, a member of Dell's investor relations department. *Id.* at 443. Ray tipped information regarding Dell's earnings numbers to Sandy Goyal, an analyst. *Id.* Goyal, in turn, relayed the information to Jesse Tortora, another analyst, who relayed it to his manager, Newman, as well as to other analysts including Spyridon Adondakis, who passed it to Chiasson. *Id.* The NVIDIA tipping chain began with Chris Choi, of NVIDIA's finance unit, who tipped inside information to his acquaintance Hyung Lim, who passed it to Danny Kuo, an analyst, who circulated it to his analyst friends, including Tortora and Adondakis, who in turn gave it to Newman and Chiasson. *Id.* Having received this information, Newman and Chiasson executed trades in both Dell and NVIDIA stock, generating lavish profits for their respective funds. *Id.*

The Government presented the following evidence regarding the relationships between the Dell and NVIDIA insiders and their respective tippees. The Dell tipper and tippee, Ray and Goyal, attended business school together and had been colleagues at Dell, but were not "close." *Id.* at 452. Goyal provided career advice and assistance to Ray, for example, discussing the qualifying examination required to become an analyst and editing his résumé. *Id.* This advice began before Ray started to give Goyal information, and Goyal testified that he would have given it as a routine professional courtesy without receiving anything in return. *Id.* As to the NVIDIA tips, the insider, Choi, and his tippee, Lim, were "family friends" who met through church and occasionally socialized with one another. *Id.* Lim testified that he did not provide anything of value to Choi in return for the tips, and that Choi did not know that he was trading in NVIDIA stock. *Id.*

The Second Circuit held that this evidence was insufficient to establish that either Ray or Choi received a personal benefit in exchange for the tip. It noted that, although the "personal benefit" standard is "permissive," it "does not suggest that the Government *may* prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Id.* Instead, to the extent that "a personal benefit may be inferred from a personal relationship between the tipper and tippee, . . . such an inference is impermissible in the absence of proof of a *meaningfully close personal relationship* that

generates an exchange that is objective, consequential, and *represents at least a potential gain of a pecuniary or similarly valuable nature.*" *Id.* (emphasis supplied).

Applying these standards, the court concluded that the "circumstantial evidence . . was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips," *id.* at 451-52, and furthermore, that "the Government presented absolutely no testimony or any other evidence that Newman and Chiasson knew they were trading on information obtained from insiders, or that those insiders received any benefit in exchange for such disclosures." *Id.* at 453.

Salman reads *Newman* to hold that evidence of a friendship or familial relationship between tipper and tippee, standing alone, is insufficient to demonstrate that the tipper received a benefit. In particular, he focuses on the language indicating that the exchange of information must include "at least a potential gain of a pecuniary or similarly valuable nature," *id.* at 452, which he reads as referring to the benefit received by the tipper. Salman argues that because there is no evidence that Maher received any such tangible benefit in exchange for the inside information, or that Salman knew of any such benefit, the Government failed to carry its burden.

To the extent *Newman* can be read to go so far, we decline to follow it. Doing so would require us to depart from the clear holding of *Dirks* that the

element of breach of fiduciary duty is met where an "insider makes a gift of confidential information to a trading relative or friend." *Dirks*, 463 U.S. at 664. Indeed, *Newman* itself recognized that the "'personal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'" *Newman*, 773 F.3d at 452 (alteration omitted) (quoting *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013)).

In our case, the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information. Specifically, Maher Kara testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother Michael. Thus, the evidence that Maher Kara breached his fiduciary duties could not have been more clear, and the fact that the disclosed information was market-sensitive – and therefore within the reach of the securities laws, *see O'Hagan*, 521 U.S. at 656 – was obvious on its face. If Salman's theory were accepted and this evidence found to be insufficient, then a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return. Proof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is

sufficient to establish the breach of fiduciary duty element of insider trading.

In Salman's case, the jury had more than enough facts, as described above, to infer that when Maher Kara gave inside information to Michael Kara, he knew that there was a potential (indeed, a virtual certainty) that Michael would trade on it. And while Salman may not have been aware of all the details of the Kara brothers' relationship, the jury could easily have found that, as a close friend and member (through marriage) of the close-knit Kara clan, Salman must have known that, when Maher gave confidential information to Michael, he did so with the "intention to benefit" a close relative. *Id.*

Accordingly, we find that the evidence was more than sufficient for a rational jury to find both that the inside information was disclosed in breach of a fiduciary duty, and that Salman knew of that breach at the time he traded on it.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BASSAM YACOUB SALMAN, AKA Bessam Jacob Salman, Defendant-Appellant.	No. 14-10204 D.C. No. 3:11-cr-00625-EMC-1 MEMORANDUM* (Filed Jul. 6, 2015)

Appeal from the United States District Court
for the Northern District of California
Hon. Edward M. Chen, District Judge, Presiding

Argued and Submitted June 9, 2015
San Francisco, California

Before: CHRISTEN and WATFORD, Circuit Judges, and RAKOFF, Senior District Judge.**

Defendant-Appellant Bassam Yacoub Salman appeals his conviction, following jury trial, for one count of conspiracy to commit securities fraud in violation

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

of 18 U.S.C. § 371 and four counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. §§ 240.10b-5, 240.10b5-1 and 240.10b5-2, and 18 U.S.C. § 2. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

Salman's convictions arose from an insider-trading scheme involving his extended family. The underlying facts and procedural history are set forth in the opinion filed concurrently with this memorandum disposition. As relevant here, the Government presented evidence at trial that Salman caused his brother-in-law, Karim Bayyouk, to trade on material non-public information that Salman received from other members of his family using a brokerage account in which Salman had an undisclosed interest. On May 31, 2007, attorneys from the Securities and Exchange Commission ("SEC") interviewed Bayyouk, who falsely denied having received information from anyone before making the relevant trades. A recording of that interview (the "Bayyouk Interview") was played for the jury at Salman's trial. Salman now claims the admission of the Bayyouk Interview violated the Confrontation Clause, and, in any event, should have been excluded under Federal Rules of Evidence 401-403. He further argues that the district

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[1] The panel granted Salman's motion to file a supplemental brief addressing the effect, if any, of the Second Circuit's opinion in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). That issue is addressed in a separate opinion filed concurrently with this memorandum disposition.

court erred in giving a "deliberate ignorance" instruction and that the cumulative effect of the district court's errors rendered his trial fundamentally unfair.[2]

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the use of testimonial out-of-court statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 68. It is well established, however, that this Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9; *see also United States v. Mitchell*, 502 F.3d 931, 966 (9th Cir. 2007). Here, it is undisputed that the Bayyouk Interview was chiefly introduced to show that Bayyouk lied to the SEC. Salman notes, however, that on summation, the prosecutor, in response to Salman's argument that his transactions with Bayyouk were somehow related to the restaurant business in which they both had an interest, made the following argument:

> First and most important, to test this defense, I want you to please consider what Karim Bayyouk said about his trading with

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[2] With respect to several of Salman's claims, the parties disagree as to the applicable standard of review. Because we find that the district court did not err regardless of which standard is applied, we need not resolve these disputes.

> Mr. Salman. He never said his trading with Mr. Salman was business-related. Far from it. *Mr. Bayyouk told the SEC that his trading had nothing to do with business, let alone business with Bassam Salman.*

(Emphasis added.)

Although he did not object at trial, Salman now contends that the final sentence quoted above demonstrates that the Government relied on some of Bayyouk's statements for their truth.

When viewed in context, however, it is clear that in making the above argument, the prosecutor was relying on the Bayyouk Interview, not for what Bayyouk actually said, but rather for what he failed to say.[3] The thrust of the Government's argument was that, if the transactions had been legitimate and business-related, then Bayyouk would have simply told the SEC as much. The fact that he failed to do so suggests that they were not. This was a non-testimonial use of the Bayyouk Interview, and therefore does not offend the Confrontation Clause.

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[3] In fact, at no point during the interview did Bayyouk tell the SEC that "his trading had nothing to do with business, let alone business with Bassam Salman." Thus, there was no underlying statement on which the Government could have relied for its truth. Although the sentence that Salman identifies may have mischaracterized the evidence to some extent, that does not transform the Government's non-hearsay use of the Bayyouk Interview into a Confrontation Clause violation.

Second, Salman argues that the admission of the Bayyouk Interview was erroneous because it is irrelevant. Federal Rule of Evidence 401 provides that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action," and Federal Rule of Evidence 402 requires that irrelevant evidence be excluded. In this case, however, the fact that Bayyouk lied strongly suggests that he knew the trading to be improper, which, in the circumstances, reasonably suggests in turn that Salman indicated to him it was improper. Therefore, Bayyouk's false statements tended to establish Salman's consciousness of guilt, and their admission was not in error. *See United States v. Hackett*, 638 F.2d 1179, 1185-86 (9th Cir. 1980).

Third, Salman contends that, even if the Bayyouk Interview was relevant, the district court should have excluded it because its probative value was "substantially outweighed" by the danger of "unfair prejudice." Fed. R. Evid. 403. Salman argues that it was unfair to taint him with Bayyouk's false statements, particularly because Bayyouk could have learned that the trading was improper as a result of the SEC investigation and not because of anything that Salman told him at the time the transactions took place. Salman was, however, free to the argue to the jury that any inference about his own state of mind was unwarranted. Evidence is not unfairly prejudicial merely because it damages the defendant's

case. *See United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988) ("[T]he more probative the evidence is, the more damaging it is apt to be."). Because the Bayyouk Interview was probative and posed little danger of unfair prejudice, its admission was not erroneous.

Fourth, Salman argues that the district court erred by giving a deliberate ignorance instruction. As a general matter, a party is entitled to a particular instruction "if it is supported by law and has foundation in the evidence." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Deliberate ignorance involves "(1) a subjective belief that there is a high probability a fact exists; and (2) deliberate actions taken to avoid learning the truth." *United States v. Yi*, 704 F.3d 800, 804 (9th Cir. 2013). In deciding whether to give a deliberate ignorance instruction, the district court must determine whether, viewing the evidence in the light most favorable to the party requesting the instruction, "the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge." *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc).

Salman contends that a deliberate ignorance instruction was not warranted because the Government presented no evidence that he took any deliberate action to avoid learning the source of Michael Kara's tips. He relies on *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), in which the Supreme Court noted that the doctrine of deliberate ignorance (also referred to as willful blindness), has two basic

requirements, "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact," and that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* at 2070. Salman urges that *Global-Tech* established that mere failure to investigate is insufficient to find deliberate ignorance.

Salman's reliance on *Global-Tech* is misplaced. In that case, the Supreme Court did not alter the standard for deliberate ignorance; rather, it imported the well-established criminal standard into the civil context of a claim for inducement to patent infringement. *Id.* at 2068-69; *cf. United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013) (stating that *Global-Tech* "did not alter or clarify the [deliberate ignorance] doctrine" and "simply describes existing case law"). Consistent with this understanding, our post-*Global-Tech* cases make clear that, at least under circumstances where a reasonable person would make further inquiries, "[a] failure to investigate can be a deliberate action." *United States v. Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013); *see also Yi*, 704 F.3d at 805 (citing *Global-Tech* and holding that deliberate ignorance instruction was warranted where jury could infer that defendant "engaged in a deliberate pattern of failing to read documents").

In this case, there were ample reasons why a person in Salman's position would seek to discover the source of the information. The Government's evidence

showed that Salman was investing large sums of money on short notice, in companies in which he had never invested previously. Moreover, the information was both highly accurate and inherently proprietary in nature, suggesting that it came from a source with inside access to the various companies. Finally, Salman knew the Kara family well, and therefore the jury could reasonably infer that he was aware of Maher's employment at Citigroup and of the Kara brothers' close relationship. Thus, if the jury believed that Salman did not actually know that the information was coming from Maher Kara, then it could rationally have concluded that the reason he did not know was that he deliberately refrained from asking. Accordingly, the district court did not err in giving the deliberate ignorance instruction.

Finally, because there was no error, there can be no cumulative error. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473, 482 (2000).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BASSAM YACOUB SALMAN, a/k/a Bassam Jacob Salman,

Defendant.

/

No. CR-11-0625 EMC

ORDER DENYING DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

(Filed Jul. 1, 2014)

(Docket No. 320)

I. INTRODUCTION

Pending before the Court is Defendant Bassam Yacoub Salman's motion for release pending appeal. Docket No. 320. For the following reasons, the Court DENIES Defendant's motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2013, a jury convicted Defendant on four counts of securities fraud and one count of conspiracy to commit securities fraud. Docket No. 253. Defendant moved for a new trial based, in part, on the argument that the Court erred by instructing the jury on the concept of "deliberate ignorance." The Court denied Defendant's motion for a new trial on December 17, 2013. *United States v. Salman*, No. CR-11-0625 EMC, 2013 WL 6655176 (N.D. Cal. Dec. 17,

2013). On April 11, 2014, the Court sentenced Defendant to 36 months in prison, followed by a three-year term of supervised release. Docket No. 286. Defendant has now moved for release pending appeal. Defendant's motion focuses solely on the propriety of the deliberate ignorance jury instruction and largely restates the arguments made in his motion for a new trial. Defendant argues that it is, at very least, "fairly debatable" whether giving the deliberate ignorance instruction was correct based on the evidence presented at trial. Docket No. 320, at 7.

III. DISCUSSION

A. Legal Standard

Under 18 U.S.C. § 3143(b), a defendant convicted of an offense is to be detained pending appeal unless the court determines (1) that the person is not likely to flee or pose a danger; and (2) that the appeal is "not for the purpose of delay and raises a substantial question of law or fact likely to result" in reversal, a new trial, a non-custodial sentence, or a term of imprisonment less than the total time expected to take the appeal. 18 U.S.C. § 3143(b). A "substantial question" is one that is "fairly debatable" or "fairly doubtful" and involves "more substance than would be necessary to a finding that it was not frivolous." *See United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985); *see also United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) ("[A] court must determine that the question raised on appeal is a 'substantial' one, i.e. it

must find that the significant question at issue is one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful."). The burden is on the Defendant to overcome the presumption that he should be detained while his appeal is pending. *See United States v. Montoya*, 908 F.2d 450, 451 (9th Cir. 1990).

B. Defendant Has Failed to Demonstrate the Existence of a "Substantial Question" as to Whether the Deliberate Ignorance Instruction Was Properly Given

The Court instructed the jury on the concept of deliberate ignorance as follows:

JURY INSTRUCTION NO. 38
COUNTS TWO THROUGH FIVE – DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and

2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of

> trust and confidence, or if you find that the defendant was simply careless or reckless.

Docket No. 245, at 43. As the Court noted in its order denying Defendant's motion for a new trial, this instruction, modeled after Ninth Circuit Model Jury Instruction 5.7, is an accurate statement of the law. *See United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007). Additionally, the instruction provided by the Court goes beyond the model instruction by explicitly stating that the jury could not find the necessary knowledge if it found that the Defendant had simply acted recklessly.

Defendant argues, however, that it is "fairly debatable" whether giving this instruction was proper because courts of appeal have rejected deliberate ignorance instructions where there is insufficient evidence from which a jury could conclude that the defendant took "deliberate action" to avoid learning the information at issue. Docket No. 320, at 4. Defendant relies primarily on the Seventh Circuit case of *United States v. L.E. Myers Co.*, 562 F.3d 845 (7th Cir. 2009). There, the Seventh Circuit held that "[f]ailing to display curiosity" is insufficient to support a deliberate ignorance instruction – rather, the defendant "must affirmatively *act* to avoid learning the truth." *Id.* at 854 (emphasis in original); *see also id.* (distinguishing between "evidence of deliberate *indifference* to the facts" and "evidence of deliberate *avoidance*"). However, it is clearly established in this Circuit that a "failure to investigate can be a deliberate action" for purposes of the deliberate ignorance

instruction. *United States v. Ramos-Atondo*, 732 F.3d 1113, 1120 (9th Cir. 2013); *see also United States v. Liddle*, ___ F. App'x ___, 2014 WL 1101051, at *2 (9th Cir. Mar. 21, 2014) ("Even if the government failed to show that Rhonda took deliberate steps to avoid discovering the truth, Rhonda's failure to investigate can be a deliberate action." (citation omitted)).

Accordingly, when the evidence at trial is such that a jury could infer that the defendant deliberately failed to investigate in the face of a "high probability" of illegality, the deliberate ignorance instruction is proper. Thus, in *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003), the court affirmed a deliberate ignorance instruction in a securities fraud action materially similar to this case. The court found that the suspicious source, timing, and success of the suspect trade information all combined to "suggest a high probability that Svoboda's tips were based on inside information and that any lack of actual knowledge on Robles' part was due to a conscious effort to avoid confirming an otherwise obvious fact." *Id.* at 481. Similarly, in *Ramos-Atondo*, the Ninth Circuit found a deliberate ignorance instruction to be proper in a drug trafficking case because

> [t]he jury could have inferred that Corona-Vidal, Martinez, and Ramos deliberately chose not to ask why they were going to unload packages at the beach in dark, wearing dark clothing, without any identification or possessions. The jury could have inferred that Ramos-Atondo chose not to examine the

> packages on the boat, or ask why he was taking a boat full of packages from Mexico to a beach in the United States in the dark using a pre-programmed GPS.

Id. These cases negate Defendant's reliance on *L.E. Myers* in arguing that deliberate inaction cannot suffice. Rather, the cases establish at least in this circuit and others (besides the Seventh Circuit) that the government need not show evidence of an *affirmative act* by the defendant before the deliberate ignorance instruction can be given – a failure to investigate may suffice. *See United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (en banc).

Defendant argues, however, that both *Ramos-Atondo* and *Svoboda* are distinguishable because they presented overwhelmingly suspicious circumstances that are not present in this case. Specifically, he asserts that "[n]othing about the source of the information or the other circumstances permitted the jury to infer beyond a reasonable doubt that Salman deliberately avoided knowledge that Mounir's information came from Maher." Docket No. 320, at 5-6. The Court disagrees. As noted above, as a legal matter, these cases negate the argument that deliberate *inaction* cannot support a deliberate ignorance instruction. Further, as a factual matter, and as discussed in its prior order, the jury in this case could have inferred from powerful evidence that Defendant deliberately failed to investigate the source of his information given, *inter alia*, (1) the relationship between Michael Kara, Mounir Kara, and the Defendant;

(2) the timing of the trades at issue (specifically that they were all made very close to major corporate announcements prior to public dissemination of that information); (3) the success of the numerous trades; and (4) Defendant's efforts to conceal his trading activity. *Salman*, 2013 WL 6655176, at *4. In short, there was substantial evidence of deliberateness.

The Court further notes that in reviewing the Court's decision to give the "deliberate ignorance" instruction, the Court of Appeals will apply an abuse of discretion standard of review. *See, e.g., United States v. Yi*, 704 F.3d 800, 804 (9th Cir. 2013) ("A district court's decision to give a particular jury instruction is reviewed for abuse of discretion."); *see also Heredia*, 483 F.3d at 922 (noting that the "decision to give a deliberate ignorance instruction" is reviewed for an abuse of discretion).

The Court concludes the issue raised by Defendant does not rise to the level of a "substantial question" of law or fact. *See United States v. Warner*, No. 02 CR 506-1,4, 2006 WL 2931903, (N.D. Ill. Oct. 13, 2006) ("Accordingly, the court will, when determining if a question raised by Defendants is 'substantial,' consider whether this court's previous resolution of the question was committed to its discretion.").

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for release pending appeal is **DENIED**.

This order disposes of Docket No. 320.

IT IS SO ORDERED.

Dated: July 1, 2014

/s/ Edward Chen
EDWARD M. CHEN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BASSAM YACOUB SALMAN, a/k/a Bassam Jacob Salman

Defendant. /

Case No. CR-11-0625 EMC

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

(Filed Dec. 17, 2013)

(Docket No. 262)

I. INTRODUCTION

Pending before the Court is Defendant's motion for a new trial. Dkt. No. 262. In September 2013, Defendant stood trial on one count of conspiracy and four counts of securities fraud. On September 30, 2013, the jury returned a verdict of guilty on all counts. Dkt. No. 253. Defendant now brings a motion for new trial under Fed. R. Crim. P. 33 asserting that the government failed to introduce evidence at trial as to two essential elements of the securities fraud claims. Defendant also argues that two jury instructions contained legal errors which lowered the government's burden of proof. For the following reasons, Defendant's motion for a new trial is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

The indictment in this case was filed on September 1, 2011. Dkt. No. 1. It alleged the following facts.

Maher Kara is a former investment banker who was employed by Citigroup in the firm's Investment Banking Division in the Healthcare Group. *Id.* ¶ 2. Defendant is Maher Kara's brother in law. *Id.* ¶ 5. From 2004 through 2007, Maher Kara provided his brother, Mounir "Michael" Kara with material, non-public information relating to a number of companies Citigroup was advising in the context of potential acquisitions. *Id.* ¶ 9-11. Michael Kara would, in turn, provide Defendant with this material, non-public information. *Id.* ¶ 16(d). Defendant would then disclose this material, non-public information to his brother in law, Karim Bayyouk, with the understanding Bayyouk would use the information to buy and sell securities in part on Salman's account and for his benefit as well. *Id.* ¶ 16(e). Defendant did this in order to conceal the purchase and sale of securities based on the material, non-public information. *Id.* ¶ 16(f).

The indictment charged Defendant with four counts of securities fraud regarding to four purchases of securities. First, on November 7, 2006, Defendant purchased 58 securities in United Surgical Partners International, Inc. ("USPI"). *Id.* ¶ 19. Second, on December 15, 2006, Defendant purchased 6,200 more securities in USPI. *Id.* On January 8, 2007, Citigroup

client Welsh, Carson, Anderson & Stowe publically announced a buyout involving USPI. *Id.* ¶ 9(c). Third, on March 23, 2007, Defendant purchased 59 securities in Biosite Incorporated. *Id.* ¶ 19. On March 25, 2007, a public announcement was released announcing that Citigroup client Beckman Coulter, Inc. would be acquiring Biosite Incorporated. *Id.* ¶ 9(d). The indictment also charged Defendant with conspiracy to commit securities fraud based on these (as well as other) transactions.

Additional facts, and a discussion of the evidence produced at trial, are included below as necessary to address the arguments raised by Defendant.

III. DISCUSSION

A. Legal Standard

Under Federal Rule of Criminal Procedure 33, a "court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "'A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal . . .'" *United States v. Inzunza*, 638 F.3d 1006, 1026 (9th Cir. 2009) (quoting *United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992)). Accordingly, a district court "'need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.'" *United States v. Kellington*, 217 F.3d

1084, 1095 (9th Cir. 2000) (quoting *Alston*, 974 F.2d at 1211).

A new trial may be granted to correct erroneous jury instructions. *See, e.g.*, *United States v. Mann*, Cr. No 11-1528, 2013 WL 6037681 (D.N.M. Nov. 7, 2013) ("A motion under Rule 33 may be 'grounded on any reason other than newly discovered evidence,' including improper jury instructions."); *United States v. Carter*, 966 F. Supp. 336, 340 (E.D.Pa. 1997) ("A Rule 33 motion for a new trial is the more appropriate method for addressing the allegedly erroneous evidentiary rulings and improper jury instructions."). In determining whether instructions are misleading or inadequate to guide the jury's deliberation, the Court evaluates the instructions as a whole. *See United States v. Chang Da Liu*, 538 F.3d 1078, 1088 (9th Cir. 2008); *see also United States v. Turner*, 189 F.3d 712 (8th Cir. 1999) ("In so doing, we do not consider portions of a jury instruction in isolation, but rather consider the instructions as a whole to determine if they fairly and adequately reflect the law applicable to the case.").

A defendant may also move for a new trial based on the weight of the evidence. Even where there exists sufficient evidence to support the verdict, a district court may nonetheless grant a motion for new trial if it "'concludes that . . the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred.'" *Kellington*, 217 F.3d at 1087 (quoting *Alston*, 974 F.2d at 1211); *see also United States v. Martinez*, 763 F.2d

1297, 1312-13 (11th Cir. 1985) (recognizing that the district court may not "set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." (citation omitted)). This is a stringent standard, and the Ninth Circuit has held that such motions are generally disfavored and should only be granted in "exceptional" cases. *See United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012); *see also United States v. Camacho*, 555 F.3d 695, 705 (8th Cir. 2009) ("New trial motions based on the weight of the evidence are generally disfavored. . . .").

B. The Deliberate Ignorance Jury Instruction Was Proper

Defendant argues that it was error for the Court to give the following deliberate ignorance instruction:

JURY INSTRUCTION NO. 38
COUNTS TWO THROUGH FIVE –
DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and

> 2. deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the defendant was simply careless or reckless.

Dkt. No. 245, at 43. This instruction, modeled after Ninth Circuit Model Jury Instruction 5.7, is an accurate statement of the law. *See United States v. Heredia*, 483 F.3d 913, 924 (9th Cir. 2007). In fact, this instruction (like the deliberate ignorance instruction given in *Heredia*), goes beyond the Model Instruction by making it explicit that the jury may not find the requisite knowledge if it found that the Defendant was merely reckless. *Id.*

Defendant argues, however, that the instruction was improper in the circumstances of this case. Defendant begins with the correct assertion that a conviction under Section 10(b) requires a showing that the defendant acted "willfully," that is, with a "'realization . . . that he was doing a wrongful act' under the securities law." *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005). The Defendant then argues that the Court deviated from this *mens rea* requirement because the deliberate ignorance instruction "lowered the standard of the burden of proof on an essential element from beyond a reasonable doubt" – specifically, the requirements that Defendant know the inside information was disclosed in

violation of a duty of trust for a personal benefit. Dkt. No. 262, at 7.

The Court disagrees. First, this Court rejects Defendant's implication that the deliberate ignorance instruction "effectively substitut[ed] a negligence standard for the requirement that the defendant acted with guilty knowledge." *Id.* The instruction given by the Court expressly stated that the jury could not find that Defendant acted with the requisite knowledge if it found that Defendant was "simply careless or reckless." Dkt. No. 245, at 43. Therefore, the jury could not have concluded that Defendant was simply negligent about the unlawful nature of the trading information and still convicted him. *See United States v. Heredia*, 483 F.3d 913, 923-24 (9th Cir. 2007) ("Nor do we agree that the *Jewell* instruction risks lessening the state of mind that a jury must find to something akin to recklessness or negligence. . Recklessness or negligence never comes into play, and there is little reason to suspect that juries will import these concepts, as to which they are not instructed, into their deliberations."). Further, Defendant's more general argument, which appears to imply that the deliberate ignorance is inconsistent with a *mens rea* requirement of "willfully" or "knowingly" cannot be reconciled with the Ninth Circuit's recognition that the "substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable." *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc).

Second, the Court notes that federal courts have routinely applied deliberate ignorance or conscious avoidance principles in securities cases which similarly required a showing that defendant acted "willfully" or with scienter. *See, e.g.*, *United States v. Whitman*, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("[W]here appropriate (as here), the Government is entitled to 'willful blindness' or 'conscious avoidance' instruction to the jury on the issue of such knowledge [regarding whether the tipper were receiving actual or anticipated benefits]."); *United States v. Berger*, 188 F. Supp. 2d 307, 329 (S.D.N.Y. 2002) (relying on deliberate ignorance principles to conclude that there was a sufficient factual basis for defendant's guilty plea in a Section 10(b) case); *see also S.E.C. v. Musella*, 678 F Supp. 1060, 1063 (S.D.N.Y. 1988) ("I cannot accept that conscious avoidance of knowledge defeats scienter in a stock fraud case, any more than it does in the typical *mens rea* criminal context.").

There was an evidentiary basis for applying the deliberate indifference instruction in this case. The case of *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003) is directly on point. In that case, Defendants Robles and Svoboda were long-time friends. *Id.* at 475. Mr. Svoboda was employed as a "credit policy officer" at a financial institution engaged in commercial lending. *Id.* At trial Mr. Svoboda testified against Mr. Robles and stated that he obtained confidential information about certain securities and tender offers and passed the information to Robles, who then used the insider information to execute trades. *Id.* Mr.

Robles testified in his own defense and argued that he had no knowledge of the unlawful source of Svoboda's information. *Id.* The district court gave a conscious avoidance instruction. *Id.* at 475-76.

The Second Circuit affirmed the propriety of the conscious avoidance instruction. First, consistent with the instruction given in this case, the Court recognized that a conscious avoidance instruction is appropriate where there is evidence that the defendant "(1) was aware of a high probability of the disputed fact and (2) deliberately avoided confirming that fact." *Id.* at 480. The Court then found that there was a sufficient factual predicate for the instruction. The Court found the following factors relevant:

- "First, the source of Svoboda's information was suspicious – Robles knew that Svoboda was a credit officer at Nations Bank and would thus be privy to confidential financial information." *Id.*
- "Second, the timing of Robles' trades was suspicious – for example, some of Robles' trades occurred as little as a day before a tender offer announcement." *Id.*
- "Third, the success of the trades was suspicious – Robles realized huge returns, up to 400%, on trades based on Svoboda's advice." *Id.*

The Court found that these three factors combined to "suggest a high probability that Svoboda's tips were based on inside information and that any lack of actual knowledge on Robles' part was due to a conscious effort to avoid confirming an otherwise obvious

fact." *Id.* at 481. In addressing the defendant's knowledge of the conspiracy, the court noted: "The conscious avoidance doctrine provides that a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of a high probability of its existence." *Id.* at 477

As in *Svoboda*, the government introduced sufficient evidence laying the foundation for a deliberate ignorance instruction. The government introduced evidence showing that Defendant knew that Maher Kara – the brother of Michael Kara from whom Defendant received his trading tips – was an investment banker at Citigroup. Further, the government showed that the trades which formed the basis of the indictment were made shortly before major corporate announcements. Moreover, the government introduced evidence of the large profits Defendant and Karim Bayyouk realized as a result of their trading. Finally (and unlike *Svoboda*), the government introduced evidence showing that Defendant utilized accounts belonging to his brother-in-law, Karim Bayyouk, to execute the trades, rather than using his own accounts; this strongly suggests consciousness of wrongdoing[1]

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[1] The one difference between the *Svoboda* case and the instant case is that here, Defendant was a "remote tippee" in that the evidence at trial suggests the insider information went from Maher Kara (the tipper), through his brother Michael Kara, and

(Continued on following page)

At the hearing on December 11, 2013, Defendant argued that the evidence at trial was insufficient to support the deliberate ignorance instruction because the government failed to introduce evidence that Defendant took "deliberate actions" to avoid learning the truth about the nature of the "tips." He points to the Supreme Court's statement in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), where the Court stated that willful blindness/deliberate ignorance requires that an individual take "deliberate actions" to avoid learning the requisite facts. Defendant argues that the government, at most, showed that Defendant *failed* to act, and that omissions of this kind cannot constitute "deliberate action" as required by *Global-Tech*.

The Court disagrees. First, as the Second Circuit has expressly recognized, *Global-Tech* did not alter the deliberate ignorance standard. Rather, "*Global-Tech* simply describes existing case law" and "did not alter the conscious avoidance standard." *Id.* at 128. Second, and more significantly, since *Global-Tech*, the Ninth Circuit has affirmed the use of a deliberate ignorance instruction where the defendant merely failed to confirm a fact. In *United States v. Yi*, 704

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then to Defendant. In the circumstances of this case, however, given the familial relationship between the parties, the Court finds this distinction immaterial as it does not negate the probative value of the evidence regarding whether there was a "strong possibility" that defendant knew the trading information was unlawful and deliberately avoided confirming the fact.

F.3d 809 (9th Cir. 2013), a defendant who had been convicted of conspiracy to violate the Clean Air Act appealed, arguing in part that the district court erred in giving a deliberate ignorance instruction regarding his knowledge of the presence in the ceiling of his condominium complex. *Id.* at 804. The Ninth Circuit affirmed the use of a deliberate ignorance instruction and, expressly addressing *Global-Tech*, stated:

> Turning to the second *Global-Tech* prong, if the jury could infer that Yi was aware of a high probability that the ceilings contained asbestos, it also could infer that Yi engaged in a deliberate pattern of failing to read documents that might clarify whether asbestos was in fact present. The evidence regarding Yi's real estate experience and pattern of failing to read documents common to real estate transactions supports a finding that Yi deliberately avoided learning the truth about whether the Forest Glen ceilings contained asbestos.

Id.

Similarly, in *United States v. Ramos-Atondo*, 732 F.3d 1113 (9th Cir. 2013), a case relied on by the government at the hearing,[2] the Ninth Circuit expressly

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[2] This case was raised by the government for the first time at the hearing. The Court provided Defendant an opportunity to address this case in a supplemental brief, ordering Defendant to file any such brief by Friday, December 13, 2013. Dkt. No. 267. Defendant opted to not file a brief.

held that a "failure to investigate can be a deliberate action." *Id.* at 1120. As a result, the Court found the district court properly instructed the jury on deliberate ignorance in a case involving a conspiracy to import marijuana drugs because:

> The jury could have inferred that Corona-Vidal, Martinez, and Ramos deliberately chose not to ask why they were going to unload packages at the beach in dark, wearing dark clothing, without any identification or possessions. The jury could have inferred that Ramos-Atondo chose not to examine the packages on the boat, or ask why he was taking a boat full of packages from Mexico to a beach in the United States in the dark using a pre-programmed GPS.

Id. It is thus apparent that the Ninth Circuit has held that the failure to ask questions or otherwise confirm a fact – such as Defendant's failure to follow up on the source of the tips in this case in light of the circumstances in this case – can constitute "deliberate action" for purposes of a deliberate ignorance instruction.

Defendant is not entitled to a new trial on the basis of the deliberate ignorance instruction. The government provided a sufficient factual basis for the instruction and the instruction as given accurately stated the law.

C. The Court Correctly Instructed the Jury on the Personal Benefit Element

The Defendant argues that the Court erred in failing to instruct the jurors that they could only convict Defendant if he "knew inside information was disclosed in exchange for a personal benefit." Dkt. No. 262, at 12. Specifically, Defendant takes issue with the following instruction:

> **JURY INSTRUCTION NO. 37**
> **KNOWLEDGE OF BREACH BY TIPPER**
>
> As to the defendant's knowledge that the insider has breached the insider's duty of trust and confidentiality in return for some actual or anticipated benefit, it is not necessary that the defendant know the specific confidentiality rules of a given company or the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the defendant had a general understanding that the insider was improperly disclosing inside information for personal benefit.

Dkt. No. 245, at 42. This instruction is identical to that given by the Southern District of New York in the case *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012).

This instruction is a correct statement of the law and is not confusing when read in its entirety and with the other instructions as a whole. First, the Court, contrary to Defendant's assertion, did unequivocally instruct the government had to prove,

beyond a reasonable doubt, that Defendant knew that Maher Kara personally benefitted in some way. Specifically, the Court instructed:

> In order to find that the government has established the first element of securities fraud . . the government must prove each of the following beyond a reasonable doubt as to each Count:
>
> (6) That the defendant knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounier ("Michael") Kara.

Dkt. 245, at 41. Second, Instruction 37 was not in conflict with this requirement and did not lower the government's burden of proof. Instruction 37 does not negate the requirement that the government prove that Maher Kara did, in fact, receive a personal benefit. Instead, Instruction 37 goes only to what Defendant knew in this regard; it stated that the government had to prove that Defendant "generally" understood that the insider improperly disclosed information for a personal benefit, but did *not* have to prove (1) that the defendant was aware of any *specific* company rule prohibiting disclosure, or (2) that the defendant was aware of the *specific* benefit given or anticipated. Defendant does not argue that the government must prove beyond a reasonable doubt that the tippee be aware of the precise benefit the tipper received by disclosing confidential insider information

and the Court has found none. *Cf. S.E.C. v. Warde*, 151 F.3d 42, 48 (2d Cir. 1998) ("[T]he Supreme Court has made plain that to prove a § 10(b) violation, the SEC need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip." (citing *Dirks v. S.E.C.*, 463 U.S. 646, 664 (1983)).[3]

In light of the clear, unequivocal instruction that the government had to prove, beyond a reasonable doubt, that Defendant knew that Maher Kara personally benefitted from his disclosure, the Court finds there was no instructional error.

D. Sufficient Evidence Was Presented at Trial Regarding Defendant's Knowledge of Maher Kara's Breach of Fiduciary Duties and Benefit

Defendant argues that a new trial is necessary because there was no evidence adduced at trial that Defendant knew that Maher Kara breached his fiduciary duties or that Maher Kara obtained a personal benefit. Dkt. No 262, at 4. The Court disagrees. As the Ninth Circuit has recognized, "'direct proof' of

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[3] Nor does the Court find any error with the use of the term "understanding" as opposed to "knowledge." *See* Black's Law Dictionary (8th ed. 2004) (defining the verb "understand" as "To apprehend the meaning of to know"); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) ("'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.").

one's specific wrongful intent is 'rarely available.' But willfulness may be inferred from circumstantial evidence." *United States v. Dearing*, 504 F.3d 897, 901 (9th Cir. 2007); *see also United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012) ("The government may demonstrate knowledge and intent through circumstantial evidence."). The Court finds that the government adduced sufficient circumstantial evidence at trial to show Defendant's knowledge regarding Maher Kara's personal benefit and breach of fiduciary duties.

Regarding Defendant's knowledge of Maher Kara's breach of his fiduciary duties, the government presented substantial circumstantial evidence, including the following:

- Defendant was aware that Maher Kara was an investment banker in the biotech industry. (Ex. 88, at 45).
- Mounir ("Michael") Kara told Defendant that his brother, Maher Kara, was the source of the trading tips Mounir gave Defendant. (Testimony of Michael Kara, p.55:11-21 ("Q: Did you inform any of those persons that your information was coming from your brother, Maher Kara? A: Yes.")).
- Mounir Kara testified that Defendant, upon learning that Maher Kara was the source of the information, told him that they had to "protect" Maher. (Testimony of Michael Kara, p. 131:3-19).
- The trades forming the basis of the indictment were made close in time to major corporate announcements that caused the price of the

purchased stocks to increase. (*See, e.g.*, Testimony of Special Agent Jeffrey Chisholm, p. 103:12-104:8).

Despite Defendant having his own trading account at Charles Schwab (Ex. 144), the trades at issue were executed through a Comerica Securities account held in the name of his brother-in-law, Karrim Bayyouk (Ex. 171), from which Defendant benefitted.

As to Defendant's knowledge that Maher Kara received a personal benefit from his disclosure of material, non-public information, the government adduced evidence at trial that Michael Kara and Mounir Kara were brothers with a very close relationship. (*See, e.g.*, Testimony of Michael Kara, p.14:2-15). It is also clear that the Defendant was close to the family, having married the sister of Maher and Mounir Kara. "Personal benefit to the tipper is broadly defined: it includes not only 'pecuniary gain,' such as a cut of the take or a gratuity from the tippee, but also a 'reputational benefit' or the benefit one would obtain from simply 'mak[ing] a gift of confidential information to a trading relative or friend." *S.E.C. v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012) (quoting *Dirks*, 463 U.S. at 663-64). In light of the evidence suggesting that defendant was aware that Michael Kara and Mounir Kara were brothers, knew the family, and was aware that Maher Kara was the source of the material, non-public information given to his brother, the Court concludes there was sufficient circumstantial evidence showing

Defendant knew that Maher Kara received a benefit from his disclosures.

Accordingly, the evidence at admitted at trial does not preponderate against the verdict, and Defendant is not entitled to a new trial. *See Kellington*, 217 F.3d at 1087.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for a new trial pursuant to Fed. R. Crim. P. 33 is **DENIED**.

This order disposes of Docket No. 262.

IT IS SO ORDERED.

Dated: December 17, 2013

/s/ Edward Chen
EDWARD M. CHEN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BASSAM YACOUB SALMAN, a/k/a Bessam Jacob Salman, Defendant-Appellant.	No. 14-10204 D.C. No. 3:11-CR-00625-EMC-1 ORDER (Filed Aug. 13, 2015)

Before: CHRISTEN and WATFORD, Circuit Judges, and RAKOFF, Senior District Judge.*

Judge Watford and Judge Christen have voted to deny the petition for rehearing en banc, and Judge Rakoff has recommended denying Appellant's en banc petition. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc is DENIED.

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* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. strict Court for the Southern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BASSAM YACOUB SALMAN, a/k/a Bassam Jacob Salman Defendant. /	Case No. CR-11-0625 EMC **FINAL JURY INSTRUCTIONS** (Filed Sep. 27, 2013)

FINAL JURY INSTRUCTIONS

* * *

JURY INSTRUCTION NO. 35

COUNTS TWO THROUGH FIVE

SECURITIES FRAUD – ELEMENTS

(15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5)

The defendant is charged in Counts Two through Five of the indictment with securities fraud in violation of federal securities law.

1. Count Two charges the defendant with securities fraud concerning the purchase of 58 securities of United Surgical Partners International, Inc. on or about November 7, 2006.

2. Count Three charges the defendant with securities fraud concerning the purchase of 6,200 securities of United Surgical Partners

International, Inc. on or about December 15, 2006.

3. Count Four charges the defendant with securities fraud concerning the purchase of 37 securities of Biosite Incorporated on or about March 23, 2007.

4. Count Five charges the defendant with securities fraud concerning the purchase of 22 securities of Biosite Incorporated on or about March 23, 2007.

As to each count you are considering, in order for Mr. Salman to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt.

First, the defendant willfully used a device or scheme to defraud someone or engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person;

Second, the defendant's acts were undertaken in connection with the purchase of securities, specifically:

1. For Count Two, that the defendant's acts were undertaken in connection with the purchase of 58 securities of United Surgical Partners International, Inc. on or about November 7, 2006.

2. For Count Three, that the defendant's acts were undertaken in connection with the purchase of 6,200 securities of United Surgical

Partners International, Inc. on or about December 15, 2006.

3. For Count Four, that the defendant's acts were undertaken in connection with the purchase of 37 securities of Biosite Incorporated on or about March 23, 2007.

4. For Count Five, that the defendant's acts were undertaken in connection with the purchase of 22 securities of Biosite Incorporated on or about March 23, 2007.

Third, the defendant directly or indirectly used an instrumentality of interstate commerce or any facility of any national securities exchange in connection with these acts; and Fourth, the defendant acted knowingly.

"Willfully" means intentionally undertaking an act for the wrongful purpose of defrauding or deceiving someone. Acting willfully does not require that the defendant know that the conduct was unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted willfully.

An act is done knowingly if the defendant is aware of the act and did not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

It is not necessary that the defendant made a profit or that anyone actually suffered a loss.

JURY INSTRUCTION NO. 36

COUNTS TWO THROUGH FIVE

DEVICE OR SCHEME TO DEFRAUD DEFINED

A "device or scheme to defraud" is merely a plan for the accomplishment of any fraudulent objective.

"Fraud" is a general term that embraces all efforts and means that individuals devise to take advantage of others.

The specific "device or scheme to defraud" or "act, practice, or course of business" that the government alleges the defendant employed in connection with Counts Two through Five of the indictment is known as "insider trading."

An "insider" is one who comes into possession of material, confidential, nonpublic information about a security by virtue of a relationship that involves trust and confidence. If a person has such "inside information" and his position of trust or confidence prevents him from disclosing that information, the law forbids him from buying or selling the securities in question or giving that information to others so that they can trade in such securities on the basis of that information.

The law also prohibits a person who is not actually an insider from trading in securities based on material nonpublic information, if the person knows that the material, nonpublic information was intended to be kept confidential and knows that the information was disclosed in breach of a duty of trust or confidence and knows that the insider personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information.

Counts Two through Five allege that the defendant engaged in insider trading as a "tippee," that is, based on the allegations that the defendant received material, nonpublic information and wrongfully used it for his own benefit when he knew that the information had been disclosed in violation of a duty of trust and confidence. A person who receives material, nonpublic information engages in an act of fraud or deceit under the federal securities laws if he buys or sells securities based on material, nonpublic information that he knows was disclosed by another person in breach of a duty of trust and confidence and knows that the insider personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information. I caution you, however, that trading on information that does not originate from an insider is not illegal.

In order to find that the government has established the first element of securities fraud – namely that the defendant used a device or scheme to defraud or engaged in any act, practice, or course of business that operates or would operate as a fraud or

deceit upon any person – the government must prove each of the following beyond a reasonable doubt as to each Count:

(1) That Maher Kara, who the indictment alleges was the "insider" or the "tipper", had a fiduciary duty or other relationship of trust and confidence with Citigroup or Citigroup's clients;

(2) That Maher Kara intentionally breached that duty of trust and confidence by disclosing confidential, material, nonpublic information to Mounir ("Michael") Kara, which information was subsequently disclosed to the defendant;

(3) That Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the confidential, material, nonpublic information to Mounir ("Michael") Kara;

(4) That the defendant knew that the information he obtained had been disclosed in breach of a duty;

(5) That the defendant used the material, nonpublic information he received to purchase or sell a security or tip for his own benefit; and

(6) That the defendant knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounir ("Michael") Kara.

JURY INSTRUCTION NO 37

KNOWLEDGE OF BREACH BY TIPPER

As to the defendant's knowledge that the insider has breached the insider's duty of trust and confidentiality in return for some actual or anticipated benefit, it is not necessary that the defendant know the specific confidentiality rules of a given company or the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the defendant had a general understanding that the insider was improperly disclosing inside information for personal benefit.

JURY INSTRUCTION NO. 38

COUNTS TWO THROUGH FIVE – DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and

2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the defendant was simply careless or reckless.

JURY INSTRUCTION NO 39

COUNTS TWO THROUGH FIVE – MATERIAL NONPUBLIC INFORMATION DEFINED

Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to purchase or sell securities.

Nonpublic information is information which is not generally available to the public through such sources as press releases, trade publications, analyst's reports, newspapers, magazines, television, radio, websites, internet chat rooms, online message boards, or other publicly available sources.

Information is considered nonpublic for purposes of insider trading until such information has been effectively disseminated in a manner sufficient to insure its availability to the investing public.

JURY INSTRUCTION NO. 40

COUNTS TWO THROUGH FIVE – BENEFIT DEFINED

Personal benefit includes not only monetary gain, such as a cut of the take or a gratuity from the tippee, but also a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature; it could include, for example, maintaining a useful networking contact, improving the tipper's

reputation, obtaining future financial benefits, or making a gift of confidential information to a trading relative or friend.

* * *

Supreme Court, U.S.
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DEC 14 2015
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No. 15-628

In the Supreme Court of the United States

BASSAM YACOUB SALMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
ROSS B. GOLDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying *Dirks* v. *SEC*, 463 U.S. 646 (1983), to hold that an insider breaches his fiduciary duty and subjects himself to criminal insider-trading liability when he gifts confidential information to a trading relative or friend.

2. Whether the court of appeals erred in holding that the evidence in this case supported the district court's decision to give the jury a deliberate ignorance instruction.

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In the Supreme Court of the United States

No. 15-628

BASSAM YACOUB SALMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals simultaneously issued a published opinion (Pet. App. 1-17), which is available at 792 F.3d 1087, and an unpublished opinion (Pet. App. 18-25), which is available at 2015 WL 4071557. The orders of the district court (Pet. App. 26-52) are not published in the Federal Supplement but are available at 2013 WL 6655176 and 2014 WL 2967424.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2015. A petition for rehearing was denied on August 13, 2015 (Pet. App. 53). The petition for a writ of certiorari was filed on November 10, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, peti-

tioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff, 17 C.F.R. 240.10b-5, 240-10b5-1, and 240.10b5-2, and 18 U.S.C. 2. Am. Judgment 1. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-25.

1. a. In 2002, Maher Kara (Maher) began working in the healthcare investment banking group at Citigroup. Pet. App. 4. In 2004, Maher began conveying to his older brother Michael Kara (Michael) confidential corporate information gleaned in the course of performing that job. *Ibid.*

Maher suspected that Michael was trading on the confidential information, although Michael initially denied it. Pet. App. 4. But as time passed, "Michael became more brazen and more persistent in his requests for inside information, and Maher knowingly obliged." *Ibid.* Between 2004 and 2007, Maher regularly shared with Michael "information about upcoming mergers and acquisitions of and by Citigroup clients." *Ibid.*

Throughout that period, Maher and Michael "enjoyed a close and mutually beneficial relationship." Pet. App. 6. Michael helped pay Maher's college tuition, "stood in for their deceased father at Maher's wedding," and taught Maher basic science to aid Maher in his work on healthcare issues at Citigroup. *Ibid.* Maher, in turn, "loved his brother very much," and he disclosed confidential corporate information to Michael to "'benefit him' and to 'fulfill[] whatever needs he had.'" *Ibid.* For instance, on one occasion Michael called Maher asking for a "favor" and for

"information"; when Michael refused Maher's offer of money, Maher tipped him about an upcoming acquisition. *Ibid.*

b. In 2003, Maher became engaged to marry petitioner's sister. Pet. App. 4. The Kara and Salman families—and Michael and petitioner in particular—formed a warm relationship. *Id.* at 4-5. In the fall of 2004, Michael began sharing with petitioner the inside information obtained from Maher. *Id.* at 5. Michael also advised petitioner to trade on that information, as Michael himself was doing. *Ibid.*

Petitioner took that advice. But rather than trade through his own brokerage account, he "arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk." Pet. App. 5. Petitioner conveyed the inside information to Bayyouk, who executed the trades, and the two split the trading profits—an amount that ultimately totaled approximately $1.7 million. *Id.* at 5, 19. "On numerous occasions," Bayyouk and Michael "executed nearly identical trades in securities issued by Citigroup clients shortly before the announcement of major transactions." *Id.* at 5.

c. Petitioner "knew full well that Maher Kara was the source of the information" that formed the basis for those trades. Pet. App. 5. Michael testified that he told petitioner "directly" at the outset that Maher was providing the information. *Ibid.* And in 2005, Michael saw papers on petitioner's desk relating to the trading and angrily warned petitioner to be careful with the information "because it was coming from Maher." *Id.* at 5-6. Petitioner agreed on the need to

"protect" Maher and promised to shred the papers. *Id.* at 6.

Petitioner also knew about the deep affection between Maher and Michael. Pet. App. 6. The Kara and Salman families were closely intertwined, and petitioner "would have had ample opportunity to observe Michael and Maher's interactions at their regular family gatherings." *Ibid.* And petitioner attended Maher's wedding, where Michael brought Maher to tears by giving a toast describing "how he spoke to [Maher] nearly every day" and explaining that Maher was "his 'mentor,' his 'private counsel,' and 'one of the most generous human beings he knows.'" *Id.* at 6-7.

2. Petitioner was charged with one count of conspiracy to commit securities fraud and four counts of securities fraud. The district court instructed the jury that petitioner could be found guilty of securities fraud only if the government established beyond a reasonable doubt that petitioner knew that he was trading on the basis of inside information and that the information had been improperly disclosed by an insider (Maher) for personal benefit. See Pet. App. 58-60.

As to the meaning of "personal benefit," the district court explained to the jury that "[p]ersonal benefit includes not only monetary gain * * * but also a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature; it could include, for example, * * * making a gift of confidential information to a trading relative or friend." Pet. App. 61-62.

As to petitioner's knowledge, the district court gave an "actual knowledge" instruction as well as a deliberate ignorance instruction. The court explained deliberate ignorance by charging the jury that "[y]ou may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant: (1) was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and (2) deliberately avoided learning the truth." Pet. App. 60. The court cautioned the jury, however, that "[y]ou may not find such knowledge * * * if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the defendant was simply careless or reckless." *Ibid.*

3. The jury found petitioner guilty on all counts. Pet. App. 7. Petitioner moved for a new trial under Federal Rule of Criminal Procedure 33, arguing that the deliberate ignorance instruction was improper and that the government adduced insufficient evidence that Maher personally benefited from disclosing the inside information. *Id.* at 34-52. The district court denied the motion. *Ibid.* Petitioner subsequently moved for release pending appeal on the ground that the deliberate ignorance instruction was improper; the court denied that motion as well. *Id.* at 26-33.

4. In two separate, contemporaneously filed opinions, the court of appeals affirmed.

a. In a published opinion, the court of appeals rejected petitioner's argument, based on the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), cert. denied, 136 S. Ct. 242 (2015), that "the evidence was insufficient to find ei-

ther that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that [petitioner] knew of such benefit." Pet. App. 9.

The court of appeals explained that, under this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983), a "tippee" who receives confidential inside information is liable if "the insider personally will benefit, directly or indirectly, from his disclosure" and "the tippee knows or should know that there has been such a breach" of fiduciary duty. Pet. App. 11 (brackets omitted) (quoting *Dirks*, 463 U.S. at 660-662). As to the existence of personal benefit to Maher, the court of appeals emphasized the statement in *Dirks* that an insider personally benefits from disclosing confidential information when he "makes a gift of confidential information to a trading relative or friend." *Id.* at 11-12 (emphasis omitted) (quoting *Dirks*, 463 U.S. at 664). The court found that "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." *Id.* at 12 (quoting *Dirks*, 463 U.S. at 664); see *ibid.* (noting that Maher testified he tipped Michael to "benefit" him and to "fulfill whatever needs he had") (brackets omitted). And as to petitioner's knowledge of the personal benefit to Maher, the court noted Michael's testimony "that he directly told [petitioner] that it was Michael's brother Maher who was, repeatedly, leaking the inside information that Michael then conveyed to [petitioner], and that [petitioner] later agreed that they had to 'protect' Maher from exposure." *Ibid.* The court stated that, given "the Kara brothers' close relationship, [petitioner] could

readily have inferred Maher's intent to benefit Michael." *Ibid.* Accordingly, the court concluded, "there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that [petitioner] knew as much." *Ibid.*

The court of appeals then addressed *Newman*, which stated that "to the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, * * * such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." 773 F.3d at 452. The court rejected petitioner's argument that "because there is no evidence that Maher received any such tangible benefit in exchange for the inside information, or that [petitioner] knew of any such benefit, the Government failed to carry its burden." Pet. App. 15. "To the extent *Newman* can be read to go so far," the court stated, that decision would "depart from the clear holding of *Dirks*." *Id.* at 15-16 (citing *Dirks*, 463 U.S. at 664).

The court of appeals also noted that the evidence of securities fraud in this case was clear and direct. See Pet. App. 17. The court observed that "the evidence that Maher Kara breached his fiduciary duties could not have been more clear, and the fact that the disclosed information was market-sensitive * * * was obvious on its face." *Id.* at 16; see *ibid.* ("the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information"). In addition, in the court's view, "the jury

could easily have found that, as a close friend and member (through marriage) of the close-knit Kara clan, [petitioner] must have known that, when Maher gave confidential information to Michael, he did so with the intention to benefit a close relative." *Id.* at 17 (internal quotation marks omitted).

b. In an unpublished opinion, the court of appeals rejected petitioner's argument that under *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011), "a deliberate ignorance instruction was not warranted because the Government presented no evidence that [petitioner] took any deliberate action to avoid learning the source of Michael Kara's tips." Pet. App. 23-25.[1] The court explained that *Global-Tech* "did not alter the standard for deliberate ignorance; rather, it imported the well-established criminal standard into the civil context." *Id.* at 24. The court concluded that, consistent with *Global-Tech*, a failure to investigate "under circumstances where a reasonable person would make further inquiries" can raise the inference that the defendant took a "deliberate action" to avoid learning the truth. *Ibid.* (citing *United States* v. *Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013)).

In this case, the court of appeals concluded, "if the jury believed that [petitioner] did not actually know that the information was coming from Maher Kara, then it could rationally have concluded that the reason he did not know was that he deliberately refrained from asking." Pet. App. 25. The court explained that the highly suspicious circumstances "ampl[y]" indicated such a deliberate course of action: petitioner was

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[1] *Global-Tech* refers to "willful blindness," see 131 S. Ct. at 2070; the court of appeals referred to the same concept as "deliberate ignorance." This brief uses those terms interchangeably.

"investing large sums of money on short notice, in companies in which he had never invested previously," *id.* at 24-25; the information he was receiving was "highly accurate" and "inherently proprietary in nature," thereby "suggesting that it came from a source with inside access to the various companies," *id.* at 25; and petitioner "knew the Kara family well," indicating "that he was aware of Maher's employment at Citigroup and of the Kara brothers' close relationship," *ibid.*

ARGUMENT

Petitioner argues that the Court should grant review to resolve a conflict over what constitutes "personal benefit" for purposes of establishing criminal insider-trading liability (Pet. 11-15), and to confirm that deliberate ignorance exists only if a defendant takes deliberate actions to avoid learning the relevant facts (Pet. 15-21). Further review of the decision below is not warranted. This Court recently declined to review the "personal benefit" issue, and no different result is warranted here—particularly because the decision of the court of appeals on that issue is correct and fully consistent with this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983). The court of appeals also correctly held that a deliberate ignorance instruction is proper when the evidence can give rise to an inference that the defendant deliberately avoided learning the truth, and its decision on that point does not conflict with any decision of this Court or another court of appeals.

1. a. In *Dirks*, this Court addressed the scope of "tipper-tippee" insider-trading liability—that is, liability that arises from an insider's disclosure of confidential corporate information to others who "exploit[]" it

for their "personal gain." 463 U.S. at 659. The Court explained that a tippee's duty is "derivative from * * * the insider's duty." *Ibid.* Accordingly, "a tippee assumes a fiduciary duty * * * when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 660.[2]

The test for a breach of duty by the insider, the Court held, is "whether the insider personally will benefit, directly or indirectly, from his disclosure." *Dirks*, 463 U.S. at 662. The Court identified two different sets of cases in which a factfinder may infer from "objective facts and circumstances" the existence of such a benefit. *Id.* at 663-664. First, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Id.* at 664; see *id.* at 663 (noting that "pecuniary gain or a reputational benefit that will translate into future earnings" amounts to a personal benefit). Second, "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend," as "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Ibid.*; see *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 311 n.21 (1985).

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[2] In addition, a "corporate 'outsider'" violates the securities laws by misappropriating nonpublic information for trading "in breach of a duty owed not to a trading party, but to the source of the information." *United States* v. *O'Hagan*, 521 U.S. 642, 652-653 (1997).

Under that test, the Court concluded, "there was no actionable violation" in *Dirks* because the insiders in that case did not breach their duty to shareholders. 463 U.S. at 665; see *id.* at 667. The tippers "received no monetary or personal benefit for revealing [corporate] secrets, nor was their purpose to make a gift of valuable information." *Id.* at 667.

b. Petitioner argues (*e.g.*, Pet. 12) that the decision below applies a "personal benefit" test that conflicts with the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied, 136 S. Ct. 242 (2015). In that case, the Second Circuit ruled that "[t]o the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, * * * such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452.

The United States petitioned for a writ of certiorari in *Newman* on the ground that the Second Circuit's ruling erroneously departed from the definition of "personal benefit" set forth by this Court in *Dirks*—a definition that encompasses the benefit obtained from conferring a gift of information on a relative or friend. See U.S. Pet. 18-22 (No. 15-137) (*Newman* Pet.). The government pointed out in its petition the existence of a conflict between *Newman* and the Ninth Circuit's decision in the instant case. Although the facts of this case do demonstrate a "meaningfully close personal relationship" between Maher and Michael within the meaning of the *Newman* standard, in upholding petitioner's conviction the court below did not require

evidence of an "objective" and "consequential" exchange between the brothers that presented a "potential gain" for Maher "of a pecuniary or similarly valuable nature." 773 F.3d at 452; see *Newman* Pet. 22-24.

On October 5, 2015, this Court denied the government's petition in *Newman*. See 10/5/15 Order List. No different result is warranted here. The split in authority alleged in the petition in this case is precisely the same split in authority alleged in the *Newman* petition, see, *e.g.*, Pet. 14 ("this case presents the identical issue on which the government sought review in *Newman*"), and no meaningful developments have taken place in the short space of time since this Court considered and denied the *Newman* petition.[3]

Petitioner asserts (Pet. 12-14) that this case presents a better vehicle than *Newman* did for this Court's review of the personal-benefit issue; he contends that the Second Circuit's ruling on the meaning of personal benefit was not outcome-determinative in that case because of a separate ruling about whether the defendants had knowledge of any benefit. But as the government explained in its *Newman* filings, the knowledge ruling was not an obstacle to this Court's review. The Second Circuit's erroneous personal-benefit ruling infected that court's knowledge ruling—

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[3] The *Newman* respondents stated in their briefs in opposition that some district courts had interpreted the Second Circuit's ruling narrowly. See, *e.g.*, Br. for Todd Newman in Opp. 29 (No. 15-137); see also, *e.g.*, *United States* v. *Melvin*, 2015 WL 7077258, at *15 (N.D. Ga. Nov. 10, 2015); *SEC* v. *McGinnis*, 2015 WL 5643186, at *18-*19 (D. Vt. Sept. 23, 2015); *SEC* v. *Holley*, 2015 WL 5554788, at *5 (D.N.J. Sept. 21, 2015). No Second Circuit decision since *Newman* has clarified its holding or addressed factual circumstances like those in this case.

and the outcome in *Newman* therefore might well have changed if this Court had deemed the Second Circuit's personal-benefit standard erroneous and remanded. See *Newman* Pet. 29-31; U.S. Reply Br. 6-9 (No. 15-137).

Indeed, review is less warranted here than in *Newman* because the decision that petitioner urges this Court to review is correct and wholly consistent with *Dirks*. The court of appeals recited *Dirks*'s explanation that an insider personally benefits when he gifts confidential information to a trading relative or friend, and it correctly determined that this "holding of *Dirks* governs this case." Pet. App. 12. As the court stated, "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." *Ibid.* (quoting 463 U.S. at 664); see *ibid.* (reciting Maher's testimony that he tipped Michael to "benefit" him and to "fulfill whatever needs he had") (brackets omitted). The court of appeals thus faithfully applied this Court's precedent to reach a factually and legally correct result, and its decision should remain undisturbed.

2. Petitioner also contends (Pet. 15-21) that the court of appeals' affirmance of the district court's decision to give a deliberate ignorance instruction did not sufficiently enforce a requirement of "deliberate actions" and therefore conflicts with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011), and with the decisions of other courts of appeals. No such conflict exists. This Court has denied certiorari in a number other cases involv-

ing the same issue,[4] and the same result is warranted here.

a. The decision below is fully consistent with this Court's decision in *Global-Tech*. Indeed, the court of appeals discussed *Global-Tech* in determining that the district court's deliberate ignorance instruction was warranted by the evidence in this case.

i. *Global-Tech*, a civil patent case, concerned whether "a party who 'actively induces infringement of a patent' under 35 U.S.C. § 271(b) must know that the induced acts constitute patent infringement." 131 S. Ct. at 2063. The Court held that knowledge of the infringing nature of the acts is required under Section 271(b) and that the knowledge requirement could be satisfied by "willful blindness." *Id.* at 2068. To determine the standard that should be used to ascertain the existence of willful blindness in the patent-inducement context, the Court looked to the criminal context, observing that "[t]he doctrine of willful blindness is well established in criminal law." *Ibid.* Surveying the courts of appeals, the Court explained that "[w]hile the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways," they "all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 2070. The Court stated that "[w]e think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Ibid.*

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[4] See, *e.g.*, *Bourke* v. *United States*, 133 S. Ct. 1794 (2013) (No. 12-531); *Brooks* v. *United States*, 133 S. Ct. 839 (2013) (No. 12-218).

The Court distilled these aspects of willful blindness from the varying formulations used by the courts of appeals. *Global-Tech*, 131 S. Ct. at 2070 n.9. For instance, the Court approvingly cited the Second Circuit's decision in *United States* v. *Svoboda*, 347 F.3d 471, 480 (2003), cert. denied, 541 U.S. 1044 (2004), which held that a willful blindness instruction is appropriate if the evidence shows that the defendant "was aware of a high probability of the disputed fact" and "deliberately avoided confirming that fact." See *Global-Tech*, 131 S. Ct. at 2070 n.9. The Court also cited a Fifth Circuit decision, see *ibid.*, that held that a willful blindness instruction is appropriate if the record supports inferences that the defendant was "subjectively aware of a high probability of the existence of" a fact and "purposely contrived to avoid learning" of it. *United States* v. *Freeman*, 434 F.3d 369, 378 (2005) (quoting *United States* v. *Scott*, 159 F.3d 916, 922 (5th Cir. 1998)).

The *Global-Tech* Court did not suggest that it intended its distillation of the "basic requirements" of willful blindness, 131 S. Ct. at 2070, to supersede or replace the range of circuit court formulations on which it relied. Rather, the Court's approving citation of varying verbal formulations of willful blindness demonstrates the opposite. These formulations, the Court recognized, in fact reflected "agree[ment]" on the core requirements of willful blindness, notwithstanding differences in the terminology. *Ibid.*

In evaluating the adequacy of the Federal Circuit's willful blindness standard, the Court examined whether that standard included the core requirements of willful blindness. *Global-Tech*, 131 S. Ct. at 2071. The Court concluded that the Federal Circuit had depart-

ed from the "proper willful blindness standard" applied by the other courts of appeals because it required only a "known risk" of infringement and "deliberate indifference" to that risk, rather than a subjective belief that infringement has likely occurred and "active efforts * * * to avoid knowing about the infringing nature of the activities." *Ibid.* The Court did not suggest that it found the Federal Circuit's standard inadequate because that court had used wording that was different from the Court's. Rather, the Court emphasized that the Federal Circuit's standard required only recklessness and was therefore substantively more lenient than the standard that the Court drew from the decisions of other courts of appeals. *Ibid.*

ii. In this case, the court of appeals found that the evidence supported the district court's decision to give a deliberate ignorance instruction. Pet. App. 23-25. That instruction charged the jury that petitioner should be deemed to have the requisite knowledge if he was "aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence" and "deliberately avoided learning the truth"—but not if he was merely "careless or reckless." *Id.* at 38-39.

The court of appeals' decision is not in any tension with *Global-Tech*. Petitioner contends (Pet. 16-21) that the court's analysis omits the second requirement of *Global-Tech*'s willful blindness formulation: that the defendant took "deliberate actions" to avoid learning of the fact at issue. To the contrary, the court of appeals applied that requirement. The court correctly explained that the evidence in this case, which showed that petitioner had overwhelming reasons to believe

that the information on which he traded came from an insider who was breaching a fiduciary duty, either demonstrated the existence of actual knowledge or gave rise to an inference that petitioner "deliberately refrained from asking" about the source of the information, Pet. App. 25; see *id.* at 24—that is, in the words of the jury instruction, that he deliberately avoided learning the truth. That analysis clearly connotes that petitioner must have taken steps to avoid discovering key information about the corrupt insider trading scheme. It is difficult to imagine how a person could deliberately avoid learning of a fact without engaging in some sort of deliberate conduct. Thus, the court of appeals' ruling is consistent with *Global-Tech*'s statement that a finding of willful blindness requires sufficient evidence that a defendant took "deliberate actions to avoid confirming a high probability of wrongdoing." 131 S. Ct. at 2070; see *id.* at 2070 n.9 (approvingly citing instructions requiring that a defendant "intentionally failed to investigate th[e] facts" or "purposely closed his eyes to avoid knowing" facts).

Petitioner also insists that the court of appeals' analysis would permit a finding of willful blindness where a defendant had been only reckless or negligent, contrary to *Global-Tech*'s strictures. That is not so. *Global-Tech* held that two "basic requirements" for a finding of willful blindness—knowledge of a high probability that the fact exists and deliberate efforts to avoid learning of it—"properly give willful blindness an appropriately limited scope that surpasses recklessness and negligence." 131 S. Ct. at 2070. Because the court of appeals applied both requirements set forth in the *Global-Tech* formulation, the

court's analysis did not permit the willful blindness issue to go to the jury based on evidence of recklessness or negligence alone.

Petitioner's insistence that he was subjected to a test for willful blindness that improperly reduced the legal standard to mere recklessness or negligence is especially unwarranted in light of the fact that the district court instructed the jury in this case that it could not find such blindness if it found "that [petitioner] was simply careless or reckless." Pet. App. 39. Given the "almost invariable assumption of the law that jurors follow their instructions," *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987), no risk exists that the properly instructed jury found willful blindness on the basis of reckless or negligent actions.

b. Contrary to petitioner's argument (Pet. 19), the decision below is also consistent with the Seventh Circuit's decision in *United States* v. *Macias*, 786 F.3d 1060 (2015).

In *Macias*, the government's case rested on the proposition that the defendant knew that money he was transporting from the United States to Mexico was drug proceeds—but the defendant testified that he thought it was proceeds from smuggling aliens. 786 F.3d at 1061. The defendant "never asked what was being smuggled, and so (if his testimony is believed) never was disabused of his assumption that it was people, not drugs, that were being smuggled." *Ibid.*

The Seventh Circuit held that the evidence did not support the district court's decision to give a willful blindness instruction. The court stated that it was unlikely that Macias had any reason to suspect that the money was drug proceeds as opposed to immi-

grant-smuggling proceeds. Indeed, he had reason to think the latter—and, the Seventh Circuit explained, "[i]t seems more likely that the cartel would not have told him what it was smuggling. For he had no need to know—and sophisticated gang members, like naval officers, know that 'loose lips sink ships.'" *Macias*, 786 F.3d at 1062; see *ibid.* (stating that no evidence existed that Macias suspected "he might be working for a drug cartel" and "took active steps to avoid having his suspicions confirmed"). The court acknowledged that "there indeed are circumstances in which a failure to ask questions is unnatural," but held that the facts before it did not amount to such circumstances. *Id.* at 1063.

That holding is consistent with the court of appeals' decision below. Unlike Macias, petitioner had "ample reasons" to suspect the critical facts and to seek to confirm them, and it is therefore reasonable to infer that his failure to do so involved a deliberate act. Petitioner was investing "large sums of money on short notice, in companies in which he had never invested previously"; the information on which he based the trades "was both highly accurate and inherently proprietary in nature, suggesting that it came from a source with inside access to the various companies"; and he "knew the Kara family well," indicating "that he was aware of Maher's employment at Citigroup and of the Kara brothers' close relationship." Pet. App. 24-25. Thus, as the court of appeals observed, the jury "could rationally have concluded that the reason [petitioner] did not know" that the information he got from Michael originated with Maher "was that he deliberately refrained from asking." *Id.* at 25. In light of this, a decision by petitioner not to confirm the nature

of the tips was deliberate action in ways that Macias's mere failure to inquire—in a circumstance where he had no reason to think to inquire—was not. Macias merely "failed to display curiosity," *Macias*, 786 F.3d at 1063; in contrast, to the extent that petitioner did not have actual knowledge, he deliberately (and unnaturally) acted to avoid substantiating that which he must have thought to be true.

c. Petitioner suggests (Pet. 20) the existence of some general confusion or disharmony in the courts of appeals, asserting that various circuits "have had varied responses to *Global-Tech*." That suggestion is misguided. *Global-Tech* does not suggest that lower courts must adopt the precise verbal formulation that the Court used to synthesize the standards employed by the courts of appeals, and those courts are enforcing the core requirements identified in *Global-Tech*.

Petitioner points out (Pet. 20 & n.8) that the Third and Eighth Circuits have changed their pattern instructions on deliberate ignorance to track the *Global-Tech* formulation more closely. That linguistic change is permissible, but it does not suggest any substantive disagreement. And, in any event, the pattern instructions on which petitioner relies cannot create a circuit conflict warranting this Court's review, because those instructions, like all pattern instructions, are not intended to bind courts, but are instead merely "helpful suggestions." *United States* v. *Norton*, 846 F.2d 521, 525 (8th Cir. 1988); see *United States* v. *Maury*, 695 F.3d 227, 259 (3d Cir. 2012), cert. denied, 133 S. Ct. 1600 (2013).

Petitioner also cites (Pet. 20 & n.10) to decisions from the First, Fifth, Sixth, and Eleventh Circuits that he says "upheld willful blindness instructions that

omit any requirement that the defendant take deliberate actions to avoid knowledge." But none of those decisions is in any conflict with *Global-Tech* either. Each of them involves instructions substantially similar to the instructions at issue in cases that this Court favorably cited in *Global-Tech*. See *United States* v. *Reichert*, 747 F.3d 445, 451 (6th Cir. 2014) (upholding instruction substantially the same as the instruction upheld in *United States* v. *Holloway*, 731 F.2d 378, 380-381 (6th Cir. 1984) (per curiam), which this Court favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9); *United States* v. *Grant*, 521 Fed. Appx. 841, 847-848 (11th Cir. 2013) (unpublished) (finding no plain error in deliberate ignorance instruction and noting that the instruction "matched almost verbatim" the instruction upheld in *United States* v. *Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995), which this Court favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9); *United States* v. *Denson*, 689 F.3d 21, 24-25 (1st Cir. 2012) (upholding instruction that tracked the instruction upheld in *United States* v. *Perez-Melendez*, 599 F.3d 31, 41 (1st Cir. 2010), which was itself favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9), cert. denied, 133 S. Ct. 996 (2013); *United States* v. *Brooks*, 681 F.3d 678, 702-703 (5th Cir. 2012) (upholding instruction materially similar to the instruction upheld in *Freeman*, 434 F.3d at 378, which this Court favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9), cert. denied, 133 S. Ct. 836, 133 S. Ct. 837, and 133 S. Ct. 839 (2013).

d. In any event, this case is a poor vehicle for consideration of a *Global-Tech* issue, because any error with respect to the deliberate ignorance instruction here was harmless and therefore not reversible. See

Neder v. *United States*, 527 U.S. 1, 8-15 (1999). The jury was given an actual knowledge instruction, and the evidence showed that petitioner had actual knowledge that Michael's stock tips were coming from Maher and that Maher was benefiting from providing them. In resisting that harmlessness analysis, petitioner suggests a lack of proof that he actually "knew that Maher Kara was the source of Michael Kara's stock recommendations." Pet. 21. But as the court of appeals explained, and as the government emphasized at closing argument, the evidence strongly and directly established that very fact: Michael testified that he told petitioner that the information was coming from Maher, and petitioner took actions (such as hiding his trading by using someone else's account) that verify his guilty knowledge. See Pet. App. 5 (citing evidence, including Michael's testimony, showing that petitioner "knew full well that Maher Kara was the source of the information"); see also 9/27/13 Tr. 1806-1807, 1815 ("We also heard additional testimony from Michael, that he repeatedly told [petitioner] that the information came from Maher.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
ROSS B. GOLDMAN
Attorney

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No. 15-628

In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St., Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

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REPLY BRIEF FOR PETITIONER

I. PERSONAL BENEFIT.

1. Just a few months ago, the government urged the Court to review the Second Circuit's interpretation of "personal benefit" in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015). The government declared that the *Newman* personal benefit definition created a split in the circuits and threatened to "hurt market participants, disadvantage scrupulous market analysts, and impair the government's ability to protect the fairness and integrity of the securities markets."[1] It added that *Newman* "created an upheaval in insider-trading law by rewriting the settled test announced in" *Dirks v. SEC*, 463 U.S. 646 (1983).[2] The government asserted that "[d]elay in [overturning the *Newman* personal benefit standard] will result in continuing and serious harm." Government *Newman* Petition at 26.

Nothing has changed since the government urged the Court to review the "personal benefit" element of insider trading. *Newman* remains the law in the Second Circuit, the "'Mother Court' in this area of the law." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting). The conflict between *Newman* and

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[1] *United States v. Newman*, No. 15-137, Petition for a Writ of Certiorari at 14-15 ["Government *Newman* Petition"].

[2] *United States v. Newman*, No. 15-137, Reply Brief for the Petitioner, at 1.

decisions of the Ninth Circuit (in this case) and the Seventh Circuit (in *SEC v. Maio*, 51 F.3d 623 (7th Cir. 1995)) remains and undoubtedly will deepen as other circuits decide whether to follow *Newman*.

Although the reasons for reviewing the "personal benefit" question are at least as strong as they were when the government filed its petition in *Newman*, it nonetheless opposes review here.[3] The government appears to have changed its position solely because it views the result in this case as correct. BIO at 13. But whether a circuit split warrants this Court's review does not depend on who won below. It turns instead on whether the court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The government acknowledged in its *Newman* petition both the split in the circuits and the importance of the question presented.

2. The government disputes that this case presents a better vehicle than *Newman*. BIO at 12-13. In *Newman*, however, resolution of the "personal benefit" question made no difference to the outcome. Because respondents Newman and Chiasson were so far removed from the tipper, they had no knowledge of any personal benefit, regardless of how defined.[4]

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[3] Brief in Opposition ["BIO"] at 9-13.

[4] *United States v. Newman*, No. 15-137, Brief for Todd Newman in Opposition, at 2 ("[E]ven if this Court were to agree with the government that the Second Circuit misstated the type of evidence required to support an inference of a benefit, the decision dismissing the indictment on the independent ground that Newman did not know of any benefit would stand."); *see id.*, Brief for Respondent Anthony Chiasson in Opposition, at 2

Here, by contrast, resolution of the "personal benefit" question indisputably determines the outcome of the case.

II. WILLFUL BLINDNESS.

1. In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), this Court held that a defendant cannot be willfully blind unless he takes "deliberate actions" or "active steps" to avoid knowledge. *Id.* at 2070. The government--echoing the position of the court of appeals--insists that a defendant can be willfully blind if he takes no "actions" or "steps" at all--if he merely fails to investigate suspicious circumstances. BIO at 16-17. As demonstrated in the petition, however, predicating willful blindness on a failure to investigate obliterates the distinction the Court drew in *Global-Tech* between willful blindness and recklessness.

The government acknowledges that *Global-Tech* specifically rejected "deliberate indifference" to a "known risk" as an adequate predicate for willful blindness. BIO at 16 (citing *Global-Tech*, 131 S. Ct. at 2071). But the government never explains the difference between a failure to investigate suspicious circumstances (which the court of appeals deemed

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(continued...)

("This Court's review would prolong this ordeal for no reason: The outcome of this case would be the same, whether or not this Court agreed with the Government's misreading of the decision below. That is because the question presented implicates just one of two independent grounds for the judgment below ").

sufficient for willful blindness) and deliberate indifference to a known risk (which this Court found insufficient in *Global-Tech*). The government's silence is telling; in fact, the two standards are functionally identical. If deliberate indifference to a known risk falls short of willful blindness, as *Global-Tech* held, then a failure to investigate suspicious circumstances must also fall short.

The government relies heavily on a footnote in *Global-Tech* citing court of appeals cases with varying formulations of the willful blindness standard. BIO at 15-16 (citing *Global-Tech*, 131 S. Ct. at 2070 n.9). That footnote might (or might not) have significance if the Court reviews a willful blindness *jury instruction* in a later case. Perhaps the requirement of "deliberate actions" or "active efforts" can be conveyed adequately to the jury by different formulations. But this case presents a more fundamental question: whether a mere failure to investigate suspicious circumstances, without more, satisfies the *Global-Tech* "deliberate actions" requirement (regardless of how that requirement is phrased). The answer to that question determines whether a willful blindness instruction may be given at all. The proper formulation of the instruction does not become an issue unless the court finds that the government has produced sufficient evidence to permit a jury to find the elements of willful blindness proven, including the "deliberate actions" element.

2. The government surmises that "petitioner must have taken steps to avoid discovering key information about the corrupt

insider trading scheme." BIO at 17. But the government presented no evidence at trial of any "steps" petitioner took to avoid learning the source of the stock tips. The government's resort to speculation about "steps" petitioner "must have taken" tacitly concedes that the *Global-Tech* "deliberate actions" requirement does not permit willful blindness to rest solely on a failure to investigate.

The government's speculative argument *presumes* that a defendant who fails to investigate suspicious circumstances has taken "active steps" to avoid discovering the suspected fact, even when (as here) there is no evidence that he has done so. Such a presumption eliminates the clear line *Global-Tech* drew between willful blindness on one hand and recklessness or deliberate indifference on the other. The government could argue by the same logic that a defendant who is deliberately indifferent to a known risk that a certain fact is true "must have taken steps to avoid discovering" that fact. Such a presumption would overturn *Global-Tech*, which rejected deliberate indifference as a predicate for willful blindness.

3. The Ninth Circuit is not the only court of appeals to misread the *Global-Tech* "deliberate actions" requirement. As the petition demonstrates (Pet. at 20), the Second and Eighth Circuits have similarly held that a failure to investigate suffices for willful blindness. Neither of those courts has explained how *inaction*--a failure to investigate--can amount to "deliberate actions" or "active steps." A concurrence from the Second Circuit goes so far as to

brand this Court's "deliberate actions" formulation a "mistake[]." Although acknowledging that *Global-Tech* "used words that might be construed as confirming the defendant's argument that 'the defendant must take deliberate actions to avoid learning of [the culpable] fact,'" the concurrence concludes that the Court was "merely (mistakenly) summarizing what it understood to be the positions of the various circuits." *United States v. Fofanah*, 765 F.3d 141, 151 n.2 (2d Cir. 2014) (Leval, J., concurring) (quoting *Global-Tech*, 131 S. Ct. at 2070), *cert. denied*, 135 S. Ct. 1449 (2015). In light of this Court's alleged "mistake," the concurrence appears to contend, the lower federal courts can disregard the *Global-Tech* "deliberate actions" requirement. Although the *Fofanah* concurrence uses unusually blunt language, its conclusion--that the "deliberate actions" requirement can be ignored--has taken firm root in at least three circuits.

4. Seeking to distinguish *United States v. Macias*, 786 F.3d 1060 (7th Cir. 2015), the government asserts that the defendant in that case "had no reason to think to inquire," while it was "unnatural" for petitioner not to investigate. BIO at 20. That is, at best, a strained distinction between the two cases; it is no more "unnatural" for the recipient of stock tips to fail to ask their source than for a smuggler of illegal proceeds to fail to make a similar inquiry. More fundamentally, however, the "natural/unnatural" distinction the government draws has no basis in *Global-Tech*. *Inaction* does not become *action* merely because it might have been natural to act. Whether natural or unnatural, a failure to investigate amounts at most to the

"deliberate indifference" that *Global-Tech* found insufficient to establish willful blindness.

5. Finally, the government asserts that this is a poor vehicle for resolving the confusion in the circuits over *Global-Tech* because the error in giving the willful blindness instruction was harmless. BIO at 21-22. As the petition explains, however, the government's actual knowledge case rested heavily on the unreliable testimony of Michael Kara and was thus far from overwhelming. Pet. at 21. In any event, this Court often grants certiorari to review important questions and leaves it to the lower courts on remand to determine whether any error requires reversal. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 414-15 (2010); *Boulware v. United States*, 552 U.S. 421, 438-39 (2008). A similar approach is appropriate here.

CONCLUSION

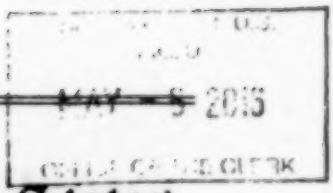
The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Law Office of
John D. Cline
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 662-2260
Counsel for Petitioner

December 2015

No. 15-628



In The
Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

JOHN D. CLINE
LAW OFFICE OF JOHN D. CLINE
235 Montgomery Street
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

Counsel for Petitioner

DONALD B. VERRILLI, JR.
Solicitor General
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

Petition For Certiorari Filed November 10, 2015
Certiorari Granted January 19, 2016

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Relevant Docket Entries
United States District Court
California Northern District (San Francisco)
CRIMINAL DOCKET FOR
CASE #: 3:11-cr-00625-EMC-1

United States v. Salman

Date Filed	#	Docket Text
09/01/2011	1	INDICTMENT as to Bassam Yacoub Salman (1) count(s) 1, 2-5. (lskS, COURT STAFF) (Filed on 9/1/2011) (lsk, COURT STAFF). (Entered: 09/01/2011)
06/18/2013	80	Proposed Jury Instructions by USA as to Bassam Yacoub Salman (Leach, Robert) (Filed on 6/18/2013) (Entered: 06/18/2013)
08/13/2013	156	Proposed Jury Instructions by Bassam Yacoub Salman (Shifman, Gail) (Filed on 8/13/2013) (Entered: 08/13/2013)
08/23/2013	176	REPLY TO RESPONSE to Motion by USA as to Bassam Yacoub Salman *Proposed Jury Instructions* (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit) (Dowling, Katherine) (Filed on 8/23/2013) (Entered: 08/23/2013)
08/26/2013	179	Proposed Jury Instructions by Bassam Yacoub Salman *REPLY TO UNITED STATES REPONSE TO DEFENDANTS OBJECTIONS TO THE UNITED STATES PROPOSED*

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08/30/2013 184 Proposed Jury Instructions by Bassam Yacoub Salman *SUPPLEMENTAL BRIEF REGARDING PROPOSED JURY INSTRUCTION ON SECURITIES FRAUD* (Attachments: # 1 Exhibit Proposed Jury Instruction Securities Fraud – Elements & Definitions) (Shifman, Gail) (Filed on 8/30/2013) (Entered: 08/30/2013)

08/30/2013 186 RESPONSE by USA as to Bassam Yacoub Salman *Additional Briefing on Proposed Jury Instructions* (Dowling, Katherine) (Filed on 8/30/2013) (Entered: 08/30/2013)

09/03/2013 189 **ORDER Re Court's Proposed Jury Instructions as to Bassam Yacoub Salman. Signed by Judge Hon. Edward M. Chen on 9/3/2013. (emcsec, COURT STAFF) (Filed on 9/3/2013) (Entered: 09/03/2013)**

09/06/2013 191 Proposed Jury Instructions by Bassam Yacoub Salman – *Objections to the Court's Proposed Jury Instructions & Request For an Additional Instruction* (Shifman, Gail) (Filed on 9/6/2013) (Entered: 09/06/2013)

09/06/2013 192 Proposed Jury Instructions by USA as to Bassam Yacoub Salman *United*

States' Response to the Court's Proposed Jury Instructions (Reeves, Adam) (Filed on 9/6/2013) (Entered: 09/06/2013)

09/12/2013 196 **ORDER Re Court's Jury Instructions as to Bassam Yacoub Salman. Signed by Judge Hon. Edward M. Chen on 9/12/2013. (emclc2, COURT STAFF) (Filed on 9/12/2013) (Entered: 09/12/2013)**

09/16/2013 213 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/16/2013 (Court Reporter Belle Ball.) (bpf, COURT STAFF) (Filed on 9/16/2013) (Entered: 09/16/2013)

09/17/2013 218 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/17/2013 (Court Reporter Connie Kuhl/Belle Ball.) (bpfS, COURT STAFF) (Filed on 9/17/2013) (Entered: 09/17/2013)

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09/20/2013 229 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/20/2013 (Court Reporter Belle Ball.) (bpf, COURT STAFF) (Filed on 9/20/2013) (Entered: 09/20/2013)

09/23/2013 237 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/23/2013 (Court Reporter Belle Ball.) (bpfS, COURT STAFF) (Filed on 9/23/2013) (Entered: 09/23/2013)

09/24/2013 238 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/24/2013 (Court Reporter Belle Ball.) (bpf, COURT STAFF) (Filed on 9/24/2013) (Entered: 09/24/2013)

09/25/2013 241 **ORDER Re Court's Proposed Jury Instructions as to Bassam Yacoub Salman. Signed by Judge Edward M. Chen on 9/25/2013. (emcsec, COURT STAFF) (Filed on 9/25/2013) (Entered: 09/25/2013)**

09/25/2013 242 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/25/2013 (Court Reporter Belle Ball.) (bpf, COURT

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09/26/2013 243 OBJECTION by Bassam Yacoub Salman *TO THE COURTS FINAL PROPOSED JURY INSTRUCTIONS AND REQUEST FOR ADDITONAL INSTRUCTION* (Shifman, Gail) (Filed on 9/26/2013) (Entered: 09/26/2013)

09/26/2013 244 RESPONSE by USA as to Bassam Yacoub Salman *UNITED STATES' RESPONSE TO THE DEFENDANT'S OBJECTIONS TO THE COURT'S FINAL PROPOSED JURY INSTRUCTIONS* (Dowling, Katherine) (Filed on 9/26/2013) (Entered: 09/26/2013)

09/27/2013 245 **FINAL JURY INSTRUCTIONS as to Bassam Yacoub Salman. Signed by Judge Hon. Edward M. Chen on 9/27/2013. (emcsec, COURT STAFF) (Filed on 9/27/2013) (Entered: 09/27/2013)**

09/27/2013 246 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub Salman held on 9/27/2013 (Court Reporter Belle Ball.) (bpf, COURT STAFF) (Filed on 9/27/2013) (Entered: 09/27/2013)

09/30/2013 252 Minute Entry for proceedings held before Judge Hon. Edward M. Chen:Jury Trial as to Bassam Yacoub

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9/30/2013 253 JURY VERDICT (bpf, COURT STAFF) (Filed on 9/30/2013) (Entered: 09/30/2013)

11/06/2013 262 MOTION for New Trial by Bassam Yacoub Salman. Motion Hearing set for 12/11/2013 03:30 PM in Courtroom 5, 17th Floor, San Francisco before Hon. Edward M. Chen. (Shifman, Gail) (Filed on 11/6/2013) (Entered: 11/06/2013)

11/22/2013 263 Memorandum in Opposition by USA as to Bassam Yacoub Salman *Motion for a New Trial* (Dowling, Katherine) (Filed on 11/22/2013) (Entered: 11/22/2013)

12/17/2013 268 **ORDER Denying 262 Defendant's Motion for a New Trial as to Bassam Yacoub Salman (1). Signed by Judge Edward M. Chen on 12/17/2013. (emcsec, COURT STAFF) (Entered: 12/17/2013)**

04/11/2014 286 **JUDGMENT in a Criminal Case as to Bassam Yacoub Salman. Signed by Judge Hon. Edward M. Chen on 4/10/14. (bpf, COURT STAFF) (Filed on 4/11/2014) (Entered: 04/11/2014)**

04/22/2014 293 NOTICE *of Appeal from Judgment & Sentence In Pro Per* by Bassam Yacoub Salman (Shifman, Gail) (Filed on 4/22/2014) (Entered: 04/22/2014)

04/22/2014 295 NOTICE OF APPEAL by Bassam Yacoub Salman re 286 Judgment in a Criminal Case Filing fee $ 505. Billed. (lskS, COURT STAFF) (Filed on 4/22/2014) (Entered: 04/23/2014)

04/23/2014 294 **ORDER of Forfeiture as to Bassam Yacoub Salman. Signed by Judge Edward M. Chen on 4/23/2014. (emcsec, COURT STAFF) (Filed on 4/23/2014) (Entered: 04/23/2014)**

04/28/2014 298 **AMENDED JUDGMENT in a Criminal Case as to Bassam Yacoub Salman (including forfeiture order.) Signed by Judge Hon. Edward M. Chen on 4/25/14. (bpf, COURT STAFF) (Filed on 4/28/2014) (Entered: 04/28/2014)**

06/06/2014 320 MOTION for Bond *Pending Appeal* by Bassam Yacoub Salman. Motion Hearing set for 6/25/2014 02:30 PM in Courtroom 5, 17th Floor, San Francisco before Hon. Edward M. Chen. (Cline, John) (Filed on 6/6/2014) (Entered: 06/06/2014)

06/13/2014 321 RESPONSE to Motion by USA as to Bassam Yacoub Salman *United States' Response to the Defendant's Motion for Release Pending Appeal*

(Reeves, Adam) (Filed on 6/13/2014) (Entered: 06/13/2014)

06/19/2014 322 REPLY TO RESPONSE to Motion by Bassam Yacoub Salman re 320 MOTION for Bond *Pending Appeal* (Cline, John) (Filed on 6/19/2014) (Entered: 06/19/2014)

07/01/2014 324 **ORDER Denying 320 Defendant's Motion for Release Pending Appeal as to Bassam Yacoub Salman (1). Signed by Judge Hon. Edward M. Chen on 7/1/2014. (emcsec, COURT STAFF) (Entered: 07/01/2014)**

07/10/2015 330 USCA Memorandum: AFFIRMED as to Bassam Yacoub Salman (lskS, COURT STAFF) (Filed on 7/10/2015) (Entered: 07/10/2015)

07/10/2015 331 OPINION: as to Bassam Yacoub Salman (lskS, COURT STAFF) (Filed on 7/10/2015) (Entered: 07/10/2015)

08/26/2015 334 MANDATE of USCA as to Bassam Yacoub Salman re 295 Notice of Appeal – Final Judgment: The judgment of this Court entered July 5, 2015, takes effect this date. This constitutes the formal mandate of this Court etc. (lskS, COURT STAFF) (Filed on 8/26/2015) (Entered: 08/26/2015)

01/28/2016 337 MOTION for Ex Parte Application- *FOR ORDER GRANTING UNOPPOSED MOTION FOR RELEASE PENDING APPEAL* by Bassam Yacoub Salman. Motion Hearing set for 1/4/2017 02:30 PM in Courtroom 5, 17th Floor, San Francisco before Edward M. Chen. (Attachments: # 1 Declaration ISO UNOPPOSED EX PARTE MOTION FOR RELEASE PENDING APPEAL, # 2 Proposed Order GRANTING UNOPPOSED EX PARTE MOTION FOR RELEASE PENDING APPEAL) (Cline, John) (Filed on 1/28/2016) (Entered: 01/28/2016)

01/29/2016 338 CLERK'S NOTICE as to Bassam Yacoub Salman vacating 1/4/2017 motion hearing. Court to take Defendant's motion for release under submission once the Illinois bond is provided to this Court. *(This is a text – only entry generated by the court. There is no document associated with this entry.)* (bpf, COURT STAFF) (Filed on 1/29/2016) (Entered: 01/29/2016)

01/29/2016 339 **ORDER granting 337 Motion for Ex Parte Application for release pending appeal as to Bassam Yacoub Salman (1). Signed by Judge Edward M. Chen on 1/29/16. (bpf, COURT STAFF) (Entered: 01/29/2016)**

01/29/2016	340	**AMENDED ORDER as to Bassam Yacoub Salman re 339 Order on Motion for Ex Parte Application for Release Pending Appeal. Signed by Judge Edward M. Chen on 1/29/16. (bpf, COURT STAFF) (Filed on 1/29/2016) (Entered: 01/29/2016)**
02/05/2016	341	**ORDER Setting Conditions of Release as to Bassam Yacoub Salman (1) unsecured $250,000.00. Signed by Judge Magistrate Judge Maria-Elena James on 2/5/16. (lskS, COURT STAFF) (Filed on 2/5/2016) (Entered: 02/05/2016)**
02/05/2016	342	Minute Entry for proceedings held before Judge Magistrate Judge Maria-Elena James:Bond Hearing as to Bassam Yacoub Salman held on 2/5/2016, Status Conference as to Bassam Yacoub Salman held on 2/5/2016. (Recording #10:04-10:07.) (lskS, COURT STAFF) (Filed on 2/5/2016) (Entered: 02/05/2016)

Relevant Docket Entries
General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 14-10204
United States v. Bassam Salman

04/23/2014	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: 36 Months. Transcript ordered by 05/13/2014. Transcript due 06/12/2014. Appellant briefs and excerpts due by 07/22/2014 for Bassam Yacoub Salman. Appellee brief due 08/21/2014 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [9070090] (IV) [Entered: 04/23/2014 03:41 PM]
07/03/2014	10	Filed (ECF) Appellant Bassam Yacoub Salman Motion for bail pending Appeal. Date of service: 07/03/2014. [9156889] (Cline, John) [Entered: 07/03/2014 09:41 PM]
07/14/2014	15	Filed (ECF) Appellee USA response opposing motion (,motion for bail pending appeal or trial). Date of service: 07/14/2014. [9168182] (Leach, Robert) [Entered: 07/14/2014 03:41 PM]

07/20/2014 16 Filed (ECF) Appellant Bassam Yacoub Salman reply to response (, , motion for bail pending appeal or trial). Date of service: 07/20/2014. [9175015] (Cline, John) [Entered: 07/20/2014 12:16 AM]

07/28/2014 17 Filed order (MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW): Appellant's motion for bail pending appeal is denied. Appellant has not shown that the appeal raises a "substantial question" of law or fact that is likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. See 18 U.S.C. § 3143(b); United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). The briefing schedule established previously remains in effect. [9183964] (AF) [Entered: 07/28/2014 03:01 PM]

07/28/2014 18 Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant Bassam Yacoub Salman. Date of service: 07/28/2014. [9184612] (Cline, John) [Entered: 07/28/2014 09:50 PM]

07/29/2014 19 Filed clerk order: The opening brief [18] submitted by Bassam Yacoub Salman is filed. Within 7 days of the

filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [18] submitted by Bassam Yacoub Salman. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9185755] (WWP) [Entered: 07/29/2014 01:15 PM]

10/27/2014 24 Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by Appellee USA. Date of service: 10/27/2014. [9291839] [14-10204] (Valliere, Barbara) [Entered: 10/27/2014 04:35 PM]

10/28/2014 25 Filed clerk order: The answering brief [24] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The

paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [24] submitted by USA. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9292113] (WWP) [Entered: 10/28/2014 08:38 AM]

11/10/2014 28 Submitted (ECF) Reply Brief for review. Submitted by Appellant Bassam Yacoub Salman. Date of service: 11/10/2014. [9308387] [14-10204] (Cline, John) [Entered: 11/10/2014 11:19 PM]

11/13/2014 29 Filed clerk order: The reply brief [28] submitted by Bassam Yacoub Salman is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9311572] (WWP) [Entered: 11/13/2014 11:12 AM]

04/07/2015 33 Submitted (ECF) Supplemental brief for review and filed Motion to file supplemental brief. Submitted by Appellant Bassam Yacoub Salman. Date of service: 04/07/2015. [9486393] [14-10204] (Cline, John) [Entered: 04/07/2015 11:18 AM]

04/15/2015 35 Filed (ECF) Appellee USA response opposing motion (motion to file supplemental brief). Date of service: 04/15/2015. [9497590] [14-10204] (Chan, Merry Jean) [Entered: 04/15/2015 05:22 PM]

04/18/2015 36 Filed (ECF) Appellant Bassam Yacoub Salman reply to response (motion to file supplemental brief,). Date of service: 04/18/2015. [9500742] [14-10204] (Cline, John) [Entered: 04/18/2015 09:39 AM]

04/21/2015 37 Filed clerk order (Deputy Clerk: WL): The Court grants appellant's motion for leave to file a supplemental brief (Docket No. 33) without prejudice to appellee's arguing that appellant has waived the argument raised therein. The Clerk is respectfully directed to file the supplemental brief received on April 7, 2015. Appellee may file an answering brief of no more than 10 pages addressing the waiver issue and/or the underlying merits by no later than May 1, 2015. Appellant may file a reply brief of no more than 3 pages by no later than May 8, 2015.

[9503253] (WL) [Entered: 04/21/2015 01:11 PM]

04/23/2015 38 Filed clerk order: The supplemental brief [33] submitted by Bassam Yacoub Salman is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9506441] (WWP) [Entered: 04/23/2015 11:49 AM]

04/30/2015 40 Submitted (ECF) Supplemental Brief and supplemental excerpts of record for review. Submitted by Appellee USA. Date of service: 04/30/2015. [9520589] [14-10204] (Chan, Merry Jean) [Entered: 04/30/2015 12:47 PM]

04/30/2015 41 Filed clerk order: The supplemental brief [40] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from

the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [40] submitted by USA. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9520753] (WWP) [Entered: 04/30/2015 01:43 PM]

05/04/2015 44 Submitted (ECF) Reply Brief for review. Submitted by Appellant Bassam Yacoub Salman. Date of service: 05/04/2015. [9523165] [14-10204] (Cline, John) [Entered: 05/04/2015 07:32 AM]

05/04/2015 45 Filed clerk order: The supplemental reply brief [44] submitted by Bassam Yacoub Salman is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF [9523233] (WWP) [Entered: 05/04/2015 08:40 AM]

06/09/2015 48 ARGUED AND SUBMITTED TO MORGAN B. CHRISTEN, PAUL J. WATFORD and JED S. RAKOFF. [9567403] (GEV) [Entered: 06/09/2015 02:02 PM]

07/06/2015 49 FILED OPINION (MORGAN B. CHRISTEN, PAUL J. WATFORD and JED S. RAKOFF) AFFIRMED., Judge: JSR Authoring. FILED AND ENTERED JUDGMENT. [9598423] (RMM) [Entered: 07/06/2015 08:40 AM]

07/06/2015 50 Filed memorandum (MORGAN B. CHRISTEN, PAUL J. WATFORD and JED S. RAKOFF) AFFIRMED. [9598434] (RMM) [Entered: 07/06/2015 08:43 AM]

07/20/2015 51 Filed (ECF) Appellant Bassam Yacoub Salman petition for rehearing en banc (from 07/06/2015 opinion). Date of service: 07/20/2015. [9614723] [14-10204] (Cline, John) [Entered: 07/20/2015 08:24 AM]

08/13/2015 52 Filed order (MORGAN B. CHRISTEN, PAUL J. WATFORD and JED S. RAKOFF): Judge Watford and Judge Christen have voted to deny the petition for rehearing en banc, and Judge Rakoff has recommended denying Appellant's en banc petition. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote

on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellant's petition for rehearing en banc is DENIED. [9645501] (AF) [Entered: 08/13/2015 09:14 AM]

08/24/2015 53 MANDATE ISSUED. (MBC, PJW and JSR) [9657624] (RR) [Entered: 08/24/2015 01:00 PM]

01/21/2016 56 Received notice from the Supreme Court. Petition for a writ of certiorari is granted limited to Question 1 presented by the petition on 01/19/2016. Supreme Court Number 15-628. [9834796] (RL) [Entered: 01/21/2016 09:53 AM]

MELINDA HAAG (CABN 132612)
United States Attorney

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BASSAM YACOUB SALMAN a/k/a Bassam Jacob Salman, Defendant.	No. *VIOLATIONS*: 18 U.S.C. § 371 – Conspiracy; 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. §§ 240.10b-5, 240.10b5-1 and 240.10b5-2, and 18. U.S.C. §2 – Securities Fraud; and 18 U.S.C. §§ 981(a)(1)(C), 21 U.S.C. § 853(p), and 28 U.S.C. § 2461 – Forfeiture. SAN FRANCISCO VENUE

INDICTMENT

The Grand Jury charges:

Introductory Allegations

At all times relevant to this indictment:

1. Citigroup Global Markets Inc., a wholly owned subsidiary of Citigroup Inc. (collectively "Citigroup"), operated as an investment bank located in New York, New York. A significant portion of Citigroup's business was devoted to advising corporations on various financings and business related transactions.

2. Maher Kara was employed as an investment banker by Citigroup in the firm's Investment Banking Division in the Healthcare Group and resided in or near New York, New York.

3. Mounir Kara, also known as Michael Kara, resided in or near Walnut Creek, California.

4. Maher Kara and Michael Kara were brothers.

5. BASSAM YACOUB SALMAN, also known as Bassam Jacob Salman, resided in or near Orland Park, Illinois.

6. Maher Kara was married to BASSAM YACOUB SALMAN's sister.

7. A person known to the Grand Jury as KIB was the brother-in-law of BASSAM YACOUB SALMAN and maintained a brokerage account at Comerica Securities.

Citigroup's Confidentiality Policy

8. Citigroup maintained written policies prohibiting the dissemination of material nonpublic and confidential information relating to pending transactions and financings in which Citigroup was involved. Throughout his employment at Citigroup, Maher Kara received repeated training and guidance about the proper use of material non-public and confidential information and the prohibitions against the improper use of such information including violations of the

insider trading laws. For example, Maher Kara was specifically instructed by Citigroup that:

> The misuse of material non-public information is a crime. Under U.S. Federal securities laws, misuse of material non-public information can constitute insider trading.
>
> * * * * *
>
> Employees may not: Use confidential information or material non-public information to trade securities for their own (or related) accounts or to advise relatives, friends or others with respect to trading.

As a licensed and trained investment banking professional, Maher Kara knew and understood the rules relating to the use of material non-public and confidential information.

The Citigroup Inside Information

9. Citigroup provided financial and investment banking services and advice to Citigroup clients in connection with the confidential transactions described below (the "Citigroup Inside Information"):

a. *Bone Care International, Inc.*: In or about April 2005, Citigroup advised Bone Care International, Inc. on a sale to Genzyme Corporation. On or about May 4, 2005, there was a public announcement relating to this transaction.

b. *Andrx Corporation*: In or about January 2006, Citigroup advised a company known to the

Grand Jury on a potential acquisition involving Andrx Corporation. On or about March 13, 2006, there was a public announcement relating to Andrx Corporation.

c. *United Surgical Partners International, Inc.*: From in or about late 2006 to early 2007, Citigroup advised Welsh, Carson, Anderson & Stowe on a buyout involving United Surgical Partners International, Inc. (also known as USPI). On or about January 8, 2007, there was a public announcement relating to this transaction.

d. *Biosite Incorporated*: In or about March 2007, Citigroup advised Beckman Coulter, Inc. about financing relating to an acquisition involving Biosite Incorporated. On or about March 25, 2007, there was a public announcement relating to this transaction.

10. As a result of his employment at Citigroup, Maher Kara had access to material, non-public information relating to the Citigroup Inside Information. Maher Kara also had access to material, non-public information relating to other confidential transactions in which Citigroup was involved.

The Insider Trading Scheme

11. From in or about 2004 through in or about 2007, Maher Kara, Michael Kara, BASSAM YACOUB SALMAN, and others participated in a scheme to defraud by executing securities transactions based on material, non-public information relating to the

Citigroup Inside Information. Maher Kara regularly and repeatedly called or communicated with Michael Kara and provided him with material, non-public information relating to the Citigroup Inside Information and other material, non-public and confidential information.

12. Using the Citigroup Inside Information, Michael Kara and BASSAM YACOUB SALMAN executed, or caused others to execute, multiple securities transactions in various brokerage accounts based on the Citigroup Inside Information. Maher Kara, Michael Kara, and BASSAM YACOUB SALMAN each benefitted from his participation and the participation of others in this insider trading scheme.

13. Between 2004 and 2007, BASSAM YACOUB SALMAN and others generated profits in excess of $1.1 million as a result of this insider trading scheme.

COUNT ONE: (18 U.S.C. § 371 – Conspiracy to Commit Securities Fraud)

14. Paragraphs 1 through 13 are realleged as if fully set forth here.

15. From in or about 2004 through in or about 2007, in the Northern District of California and elsewhere, the defendant,

BASSAM YACOUB SALMAN,

and others, did unlawfully, willfully, and knowingly, conspire and agree and with one another to commit an offense against the United States, to wit, securities

fraud, in violation of Title 18, United States Code, Section 371, and Title 15, United States Code, Section 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5, 240.10b5-1 and 240.10b5-2.

The Means and Methods of the Insider Trading Conspiracy

16. Among the means and methods by which BASSAM YACOUB SALMAN and others carried out this insider trading conspiracy were the following:

a. Maher Kara misappropriated the Citigroup Inside Information in violation of (i) the fiduciary and other duties of trust and confidence that Maher Kara owed to Citigroup and Citigroup's clients; (ii) the expectations of confidentiality of Citigroup's clients; and (iii) Citigroup's policies and procedures relating to the use and safekeeping of confidential and material, non-public information.

b. Maher Kara, in breach of his duty of confidentiality to Citigroup and Citigroup's clients, disclosed the Citigroup Inside Information that Maher Kara had misappropriated from Citigroup and Citigroup's clients to Michael Kara, with the understanding that Michael Kara would use the Citigroup Inside Information to purchase and sell securities, and Maher Kara thereby received and caused others to receive substantial illegal profits.

c. Michael Kara, while in possession of the Citigroup Inside Information that he knew had been misappropriated by Maher Kara in breach of the duty owed by Maher Kara and Citigroup to keep such information confidential, purchased and sold securities based on such information and caused others to purchase and sell securities based on such information and thereby received and caused others to receive substantial illegal profits.

d. Michael Kara disclosed some or all of the Citigroup Inside Information that Maher Kara had misappropriated from Citigroup and Citigroup's clients to BASSAM YACOUB SALMAN and others, with the understanding that BASSAM YACOUB SALMAN and others would use, or cause others to use, the Citigroup Inside Information to purchase and sell securities, and Michael Kara thereby received and caused others to receive a benefit including substantial illegal profits.

e. BASSAM YACOUB SALMAN disclosed some or all of the Citigroup Inside Information that Maher Kara had misappropriated from Citigroup and Citigroup's clients to KIB, with the understanding that KIB would use, or cause others to use, the Citigroup Inside Information to purchase and sell securities, and BASSAM YACOUB SALMAN thereby received and caused others to receive a benefit including substantial illegal profits.

f. BASSAM YACOUB SALMAN used or caused KIB to use the Comerica Securities brokerage

account in the name of KIB to conceal the purchase and sale of securities using the Citigroup Inside Information.

Overt Acts in furtherance of the Insider Trading Conspiracy

17. In furtherance of the conspiracy and to effect the illegal object thereof, Maher Kara, Michael Kara, and BASSAM YACOUB SALMAN, committed and caused others to commit the following overt acts, among others, in the Northern District of California and elsewhere:

a. On or about April 28, 2005, Michael Kara telephoned BASSAM YACOUB SALMAN.

b. On or about May 2, 2005, BASSAM YACOUB SALMAN caused the purchase of approximately 300 securities in Bone Care International, Inc. in Comerica Securities Account 0RJ-610917.

c. On or about May 3, 2005, BASSAM YACOUB SALMAN caused the purchase of approximately 300 securities in Bone Care International, Inc. in Comerica Securities Account 0RJ-610917

d. On or about February 24, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 99 securities in Andrx Corporation in Comerica Securities Account 0RJ-610917

e. On or about February 24, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 144 securities in Andrx Corporation in Comerica Securities Account 0RJ-610917.

f. On or about March 9, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 130 securities in Andrx Corporation in Comerica Securities Account 0RJ-610917

g. On or about March 9, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 140 securities in Andrx Corporation in Comerica Securities Account 0RJ-610917

h. On or about August 9, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 35 securities in United Surgical Partners International, Inc. in Comerica Securities Account 0RJ-610917.

i. On or about August 11, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 48 securities in United Surgical Partners International, Inc. in Comerica Securities Account 0RJ-610917

j. On or about September 7, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 35 securities in United Surgical Partners International, Inc. in Comerica Securities Account 0RJ-610917

k. On or about November 7, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 49 securities in United Surgical Partners International, Inc. in Comerica Securities Account 0RJ-610917.

l. On or about December 12, 2006, BASSAM YACOUB SALMAN caused the purchase of approximately 99 securities in United Surgical Partners International, Inc. in Comerica Securities Account 0RJ-610917

m. On or about March 22, 2007, Michael Kara telephoned BASSAM YACOUB SALMAN.

n. On or about March 23, 2007, BASSAM YACOUB SALMAN caused the purchase of approximately 15 securities in Biosite Incorporated in Comerica Securities Account 0RJ-610917.

o. On or about March 23, 2007, BASSAM YACOUB SALMAN caused the purchase of approximately 20 securities in Biosite Incorporated in Comerica Securities Account 0RJ-610917

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH FIVE: (15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. §§ 240.10b-5 and 240.10b5-2; 18 U.S.C. § 2 – Securities Fraud – Aiding and Abetting)

18. Paragraphs 1 through 17 are realleged as if fully set forth here.

19. On or about the dates set forth below, in the Northern District of California and elsewhere, the defendant,

BASSAM YACOUB SALMAN,

did willfully, directly and indirectly, by use of the means and instrumentalities of interstate commerce, the mails and the facilities of national securities exchanges, in connection with the purchase and sale of securities, use and employ manipulative and deceptive devices and contrivances, and aided and abetted others in using and employing manipulative and deceptive devices and contrivances, in violation of Title 15, United States Code, Section 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5, 240.10b5-1 and 240.10b5-2, and Title 18, United States Code, Section 2, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, BASSAM YACOUB SALMAN executed or caused others to execute the securities transactions listed below based on material, non-public information and confidential information Michael Kara and BASSAM YACOUB SALMAN obtained from Maher Kara:

COUNT	TRADE DATE	SECURITY	ACCOUNT	TRADE
TWO	November 7, 2006	United Surgical Partners International, Inc.	Comerica Securities 0RJ-610917	purchased 58 securities
THREE	December 15, 2006	United Surgical Partners International, Inc.	Comerica Securities 0RJ-610917	purchased 6,200 securities
FOUR	March 23, 2007	Biosite Incorporated	Comerica Securities 0RJ-610917	purchased 37 securities
FIVE	March 23, 2007	Biosite Incorporated	Comerica Securities 0RJ-610917	purchased 22 securities

All in violation of Title 15, United States Code, Section 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b-5, 240.10b5-1 and 240.10b5-2; and Title 18, United States Code, Sections 2 and 371.

FORFEITURE ALLEGATION: (18 U.S.C. § 981(a)(1)(C); 21 U.S.C. § 853(p); and 28 U.S.C. § 2461)

20. Paragraphs 1 through 19 are realleged as if fully set forth here and by this reference fully incorporated herein for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States

Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461.

21. Upon a conviction of any of the offenses alleged in Counts One through Five, the defendant,

BASSAM YACOUB SALMAN,

shall forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, all right, title and interest in property, real and personal, involved in said violations as alleged in Counts One through Five of this Indictment, including but not limited to the following property: a sum of not less than $1.1 million, representing the amount of proceeds obtained as a result of the offenses alleged in Counts One through Five.

22. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

any and all interest defendant has in any other property, up to the value of the property described in paragraph 23 above, shall be forfeited to the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

All in violation of Title 15, United States Code, Section 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b-5, 240.10b5-1 and 240.10b5-2; Title 18, United States Code, Sections 2, 371 and 981(a)(1)(C); Title 21, United States Code, Section 853(p); and Title 28, United States Code, Section 2461.

DATED: September 1, 2011

A TRUE BILL

/s/ [signature omitted]
FOREPERSON

MELINDA HAAG
United States Attorney

/s/ Miranda Kane

MIRANDA KANE
Chief, Criminal Division

Approved as to form:

/s/ Adam A. Reeves

ADAM A. REEVES
Assistant United States Attorney

Volume 2
Pages 248-505

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA,	)
Plaintiff,	) NO. CR 11-0625 EMC
vs.	) San Francisco, California
BASSAM YACOUB SALMAN,	) Tuesday
	) September 17, 2013
Defendant.	) 8:51 a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

[285] time period?

A. I did.

Q. And how so, approximately? How often?

A. You know, probably a couple of times a month, dinner or, you know, drinks.

Q. And as a banker at Citigroup, did you work on confidential matters involving material, nonpublic information?

A. I did.

Q. And can you give us some examples to the jury of the types of confidential matters that you dealt with while a banker at Citigroup?

A. Well, we worked a lot with public companies, so anytime you're working on a transaction or a financing or advisory product for a public company, that would certainly be confidential. If we were selling a business, for a – private equity firms typically own private businesses, so if you were selling a business for a private equity firm, you would be running

a sale process, and the information in that sale process would be confidential. You wouldn't want other buyers to know what people were bidding on assets or, you know, who else was in the process. You know, virtually most of what we did was confidential.

Q. And why wouldn't you want other people – do you mean the public by "other people"? – to know about these deals?

[286] A. For public companies? Well, for public companies, it could affect – you know, knowing what a public company was doing could affect their stock price, in theory.

Q. And what would be the result of that, if the public found out about that?

A. Well, would depend on what you're working on, but it could cause the stock to go up or down, depending on what the situation was.

Q. And might that be injurious to your client, whichever company you were working with?

A. Yes, could be.

Q. So were there policies and procedures in place at Citigroup with regard to your use of confidential information?

A. To my recollection, there were, yes.

Q. And do you recall Citigroup providing you training on these policies and procedures?

A. I do.

Q. Can you provide some examples of the training you would have received at Citigroup?

A. There were – there was a – my memory was either there were, you know, conference calls you would dial into and listen in and be logged in so you could confirm that you listened to the call. Or at the time there was online training, where you would, you know, pull up a training video and you would click through it and answer questions and kind [287] of be reminded of either confidentiality issues or money laundering – just kind of all the basic securities, you know, issues that we deal with.

Q. And did these take place on a regular basis or semi regular basis?

A. My memory was it was a regular basis. At least annually.

Q. You indicated at the group meetings individuals discussed deals. Would you discuss deals with your colleagues within healthcare banking at Citigroup?

A. I would.

Q. And do you recall discussing your deals with your colleague, Maher Kara?

A. I don't specifically remember, you know, discussing deals with Maher, but it was likely that we spoke about what we were working on.

Q. Would you have hesitated to speak with Maher Kara about the deals you were working on?

A. No.

Q. Why? Why is that?

A. Well, we were colleagues. We worked together and we were – you know, it was a team kind of environment where you work with folks and, you know, if there was a concern about confidential information, that you didn't really have that concern within the folks that you worked with.

Q. I want to move now to the time period, mid 2006 to early

* * *

[293] admitted.

(Trial Exhibit 317 received in evidence)

BY MS. DOWLING:

Q. Mr. Decelles, if you could look at the subject line of this exhibit, please.

A. Yep.

Q. If you could highlight the subject line.

Mr. Decelles, if you could see in the subject line there appear to be some code numbers and the words Project Unicorn. What is that reference to?

A. I believe that's the reference to the code name for the deal with United Surgical Partners.

Q. And why is there a code name for this United Surgical Partners deal?

A. You typically code name M&A projects or, you know, projects for public companies in case a document's left around or if you're on a plane, for example, and you're looking at some documentation and you would not want to have the name of a public company easily displayed where someone sitting next to you could read over your shoulder, so you try to code-name sensitive material.

Q. Sensitive material, so confidential material?

A. Yes.

Q. To protect the confidentiality of the –

A. Yes, correct.

* * *

[301] A. January 3rd, 2007

MS. DOWLING: Your Honor, I move Exhibit 324 into evidence.

MS. MOEEL: Objection. Foundation; hearsay.

THE COURT: Objection overruled. 324 is admitted. (Trial Exhibit 324 received in evidence)

BY MS. DOWLING:

Q. I want to focus your attention, Mr. Decelles, on – you said that this e-mail was dealing with the timing of the deal – and first, what is the date of this e-mail again?

A. January 3rd, 2007

Q. So if we look at the first paragraph, the last sentence says, "This does expose us to a few more days of market risk, but not much we can do. So absolutely critical that there are no leaks."

A. Yep.

Q. Why is it critical that there are no leaks?

A. This is going back a few years. My memory is that there was an agreed-upon deal by the board at this point, meaning the board had agreed to sell the company at a certain price. If there were leaks in the market that the company's being bought, in theory, that stock price would go up. And if it went up, either too close to the price they had agreed upon or above the price they had agreed upon to sell, then you wouldn't do the deal.

[302] Q. So Mr. Zimmerman was sending this out to say, Safeguard this information; it's confidential; we don't want it to get out to the public?

A. Not specifically this information, but kind of a reminder: Make sure no one's talking about it, it's not going to be announced until Monday, and keep it quiet.

Q. Okay. You can set that exhibit aside, please.

A. Okay.

Q. I'll show you the last exhibit. This has been marked as Exhibit 402. Take a look at that.

A. Yep.

Q. Do you recognize this exhibit?

A. Yes.

Q. And what is this, Mr. Decelles?

A. This is a press release from the company, United Surgical Partners, announcing that they've been acquired by Welsh, Carson, and for the amount per share that the deal will be done at.

MS. DOWLING: Your Honor I'd like to move Exhibit 402 into evidence, please.

MS. MOEEL: No objection.

THE COURT: All right. 402 is admitted.

(Trial Exhibit 402 received in evidence)

BY MS. DOWLING:

Q. Mr. Decelles, what is the date of this press release?

* * *

[305] Q. The harm that could come to your clients, right?

A. Yes.

Q. The harm that could come to your employer?

A. Yes.

Q. And your employer made sure that you understood the significance of your duty of confidentiality?

A. Yes.

Q. That the significance was in part to protect your employer's business interests?

A. Yes. And reputation, yes.

Q. And reputation. And your clients' business interests as well?

A. Correct.

Q. You attended training courses annually for the updates?

A. Yeah, I believe. Yes, at least annually. I believe that's correct.

Q. At least annually. So it could have been several times a year?

A. Yes.

Q. And you received that training to learn how to handle nonpublic information?

A. Yes, among other things, yes.

Q. Among other things.

A. Yes.

Q. How to not break the law in other ways?

[306] A. Correct.

Q. How to not launder money?

A. Yes.

Q. How to not insider trade?

A. Yes.

Q. The – at Citigroup, you also had an employee handbook that told you the rules that you needed to follow, right?

A. Um, I'm sure there was. I don't recall it, but I would imagine there was a handbook of some sort. Whether it was online or an actual book, I don't remember.

Q. Okay. Was there a handbook that you're familiar with at your current job at Jeffries?

A. No.

Q. The handbook would have explained what the rules of the position were, right?

A. In theory, yes.

Q. Citigroup took its training of his employees seriously, I believe it's fair to say?

A. I believe they did.

Q. You're confident that because of the extensive training that Citigroup had, the employees that were working under you understood their duties with regard to confidentiality?

A. I do. I did.

Q. And basically the rules on this subject are drilled into you from Day 1?

* * *

[311] A. Yes.

Q. And what locations did that include?

A. New York and San Francisco.

Q. And again, in this time period, while you, 2005 to 2007, while you were a vice-president and then director in the healthcare group at Citigroup, what were your duties and responsibilities? How would you describe your job?

A. I was responsible for the relationships with clients, and managing transaction teams for projects that we worked on for clients.

Q. So what types of clients would you provide banking services to?

A. Within the healthcare sector, primarily biotechnology companies and medical device companies, public companies.

Q. And what – you say you also managed teams within the healthcare group. What do you mean by that?

A. When we worked on projects, if I had associates or analysts working on a transaction for me, I would manage the work that they did and give direction to the team.

Q. All right. And are you like most other people working in corporate structures, where you have some people above you, some people below you?

A. Yes.

Q. All right. So, in this period, were the deals and transactions that you described working on confidential [312] sometimes?

A. Yes.

Q. And in this period, did Citigroup have policies and rules regarding the use of confidential information?

A. Yes.

Q. And did that extend to the use of what is known as material, nonpublic information?

A. Yes.

Q. What do those terms mean to you, material, nonpublic information, Mr. Schwake?

A. Information that has not been released publicly in press releases or whatever by the company. And is material in nature in that it could impact either the share price or business in some fashion.

Q. All right. Now, in 2005 to 2007, did the clients that you were helping with these banking services have an interest in keeping nonpublic information confidential in certain circumstances?

A. Yes.

Q. And what type of interest would your clients have in keeping this information confidential?

A. If they were working on transactions that had not been publicly released, the release of that information could impact the – their own share price, the share price of target companies that they might be looking to acquire or joint [313] venture projects that they're working on. The release of information about planned dividends or share repurchases could impact the share prices, so could have detrimental effects on the company's plans.

Q. And if you're working on a possible acquisition, for example, could the unauthorized, premature release of confidential information have an effect on that particular deal?

A. Yes.

Q. In what way?

A. Most typical case might be that that information that a target company was to be acquired got out, that the share price on that company might increase, and make the transaction even more expensive and more difficult to complete.

Q. More expensive for the client, right?

A. Yes.

Q. All right. While you were at Citigroup during this period of time, were you trained on how to handle and use material, nonpublic information?

A. Yes.

Q. Is that also sometimes referred to as inside information?

A. Yes.

Q. Describe, if you would, the nature of your training at Citigroup in this period on that subject.

A. I recall regular, in-person training sessions; and then [314] online refresher sessions.

Q. Okay. Was this an important thing to get right at Citigroup?

A. Yes.

Q. All right. Do you know someone by the name of Maher Kara?

A. Yes.

Q. And how do you know Mr. Kara?

A. He worked in the healthcare investment banking group at Citi.

Q. And was he a colleague of yours during this period?

A. Yes.

Q. Again, in the period 2005 to 2007, describe your contact or level of contact with Mr. Maher Kara.

A. You know, in events where we had the group gathered, we would see each other, work together. We had occasional interaction over the phone and by e-mail, certainly.

Q. Now, you're in Los Angeles. Where was Mr. Kara located, to the best of your knowledge?

A. In New York.

Q. Were there meetings within the healthcare group that occurred by telephone conference call, for example?

A. Yes.

Q. And did both of you participate in any of those meetings?

A. I don't recall specifically, but I believe so, yes.

[315] Q. It would be your expectation that when the group was gathered in both locations, that you and Mr. Kara would be at those healthcare group meetings?

A. Yes.

Q. All right. Now, in this time period, do you ever recall seeking Mr. Maher Kara's advice about any particular type of subject if it arose in your work within Citigroup?

A. Yes.

Q. And what subjects would you consult with Mr. Kara about?

A. In the area of oncology, and companies in that space.

Q. What does oncology mean?

A. The study and science of cancer and the treatment of cancer.

Q. The treatment of cancer. And why would you reach out to Mr. Kara if you had a question about oncology?

A. He was expert in that field in terms of the companies working in that space, and I had clients that were also in that space. So we might confer on the ongoings in the oncology sector.

Q. And in those occasions when you reached out to him, did you rely on the advice that he gave you about oncology, for example?

A. Yes.

Q. All right. In 2005 and 2007, during meetings of the healthcare group within Citigroup, would the investment [316] bankers that were meeting discuss confidential, nonpublic information?

A. Yes.

Q. And describe how that would happen? Why would that be occurring during the meetings of the healthcare group?

A. In our regular meetings of the group of investment bankers who would, you know, who would talk about transactions that were ongoing or pending, in order to confer, get advice, make sure there weren't conflict issues with other clients.

Q. What does a conflict issue mean?

A. If, like two clients with opposing interests, make sure that you're not working for both of them in an opposing fashion.

Q. All right. And on those occasions, would you talk openly about our deals and the status of the particular deals you were working on?

A. Yes.

Q. All right. And what expectation would you have of the other investment bankers who were attending these meetings with regard to keeping that information confidential?

A. That they would keep that information confidential.

Q. And why do you have that expectation?

A. They received the same training that I did, and they were aware of the confidential nature of the information, and the repercussions of not keeping it confidential.

[317] Q. On those occasions when you spoke with Maher Kara on oncology or other subjects that were within his field of expertise, as you described it, was it your expectation that he would keep that information confidential?

A. Yes.

Q. I'd like to direct your attention, if I could, please, to in or around April 2005. At or around that

time, did you work on a transaction involving Bone Care, International?

A. Yes.

Q. Are you familiar with Bone Care?

A. Yes.

Q. What is Bone Care, International?

A. Bone Care, International is a pharmaceutical company.

Q. Okay. And what was the nature of the deal that you were working on in that time period?

A. We represented Bone Care in their sale to Genzyme, which was a large biotechnology company.

Q. And did that sale eventually transpire?

A. Yes, it did.

Q. Did that happen sometime in or around May 2005?

A. Yes.

Q. Now, prior to the time the deal was transacted, was the information relating to this possible deal confidential?

A. Yes, it was.

Q. Was it material, nonpublic information in that period of

* * *

[328] A. Biosite was another medical diagnostic company with unique technologies that Beckman Coulter did not have.

Q. All right.

Now, moving forward a little bit in time to on or around March 25th 2007, at or about that time, was information about the Beckman Coulter/Biosite deal publicly announced for the first time?

A. I don't specifically recall the date that it was publicly announced.

Q. But did there come a time when there was an announcement of a deal?

A. Yes.

Q. Sometime later on in 2007; is that correct?

A. Yes.

Q. All right. I'd like to talk about the period of time while you were working on the deal before there was a public announcement. Is that period clear to you?

A. Yes.

Q. In that period of time, in or around February and earlier March 2007, was this possible deal between Beckman Coulter and Biosite confidential information?

A. Yes.

Q. Was it material, nonpublic information?

A. Yes.

Q. Why was it material, nonpublic information?

[329] A. It was a transaction that they were contemplating that had not been publicly – the public had not been made aware of. And the release of that information could impact their ability to effect the transaction.

Q. And "their ability" would be Beckman Coulter's ability?

A. Correct.

Q. How could the early or unauthorized disclosure of Beckman Coulter's interest in Biosite have affected Beckman Coulter's ability to complete the transaction? How would that affect that?

A. The share price on Biosite might raise if there's speculation on the transaction, and thus make it more expensive for Beckman Coulter to effect that transaction.

Q. Okay. Good. Let me show you, if I could, Exhibit 8, please.

Do you recognize Exhibit 8?

A. I do.

Q. What do you recognize it to be?

A. This is an e-mail with an attachment, which is a presentation that we made to Beckman Coulter regarding financing and capital structure.

Q. And when was this e-mail sent? According to the document?

A. March 3rd, 2007.

Q. Are you one of the recipients of the email with the

* * *

[338] Q. What does that mean?

A. Louisiana was the code name for the project, Beckman Coulter's proposed acquisition of Biosite.

Q. Why do you use code names like Louisiana for the deal?

A. To help preserve the confidentiality of the transaction, of the information.

Q. Is that a regular practice within Citigroup during this time?

A. Yes.

Q. So what's accomplished by using a code name where, by contrast, people within the health-care group had still talk about the deals? Help us understand why you would use a code name, please.

A. If a document or correspondence or communication with information about the transaction gets beyond the group or is lost, you know, by somebody on

the outside, if it has project names and code names, presumably won't be able to identify it, or at least it would make it harder for them to identify the companies that we're talking about.

Q. Okay. Thank you. I'm done with that.

I'd like to show when you has been marked as Government Exhibit 12 for identification.

If I may approach?

THE COURT: Yes.

Q. Do you recognize Exhibit 12?

* * *

[350] training about the rules and regulations of your industry?

A. Yes.

Q. And part of that was how to handle confidential, nonpublic information, as you discussed, right?

A. Correct.

Q. And at your time at Citigroup, you received plenty of training on that topic?

A. Yes.

Q. It was annually, at least, right?

A. As I recall.

Q. Sometimes several times a year?

A. Yes.

Q. And you also understood then why the duty of confidentiality was important for you and your clients?

A. Yes.

Q. And your employer?

A. Yes.

Q. Great. Among the documents that you testified about on direct – I don't know if you recall, and if you don't, I'll show you, but there's a stamp on the bottom of each document that indicates that the document is confidential. Do you recall seeing that stamp?

A. On some of the documents.

Q. Okay. Let me pull some up for you.

Your Honor, may I approach, please?

* * *

[356] you, Mr. Kara. If you could take a look at it and let us know if you recognize that.

A. Yes, I do.

Q. What do you recognize that document to be?

A. This is a copy of a plea agreement that I entered into with the United States government.

Q. And if you could please turn to Page 9 of Exhibit 85.

A. Yes.

Q. And is that your signature on that page?

A. Yes, it is.

Q. And what is the date of the plea agreement?

A. July 6, 2011.

Q. And are you familiar with the contents of the plea agreement?

A. Yes, I am.

Q. Mr. Kara, what crimes have you pled guilty to?

A. I've pled guilty to two crimes. The first is to securities fraud, and specifically with relation to insider trading; and the second crime was conspiracy to commit securities fraud.

Q. And how did you commit the crimes of conspiracy and insider trading?

A. Starting with insider trading, I illegally tipped my brother, Mounir Michael Kara, with the intent that he benefit from information about companies or stocks.

[357] And then, with conspiracy to commit securities fraud, it was similarly that the information that I was giving my brother I knew would benefit him.

Q. And have you been sentenced for those crimes?

A. No, Ma'am, I have not.

Q. And if you could please turn to Page 6.

A. (The witness complies)

Q. And as part of your plea agreement, Mr. Kara, have you agreed to cooperate with the government?

A. Yes, I have.

Q. And what do you mean by "cooperate"? What does that mean to you?

A. To me, when I entered into the agreement, it was really to respond truthfully to questions about my conduct as well as any other questions that the government had regarding this matter.

Q. If you could turn now to Page 8, and there's a section on Page 8 under a heading called "government's promises"

A. Yes.

Q. What promises has the government made to you in the plea agreement?

A. Really just what is written here. And specifically it was, the way I understood it, was about moving to dismiss any other open charges that were related to this case, agreeing not to add any additional charges than the two that I have

* * *

[359] A. Yes, in 1976, there was a civil war ongoing in Lebanon and my parents emigrated to the United States. We eventually settled in the Bay Area.

Q. And do you live in the Bay Area now?

A. Yes, I do.

Q. And do you have any siblings?

A. I do. I have older brother, Mounir – Michael – Kara. And I have a sister, Mya, and her married name is Pendleton.

Q. How much older is your brother, Michael, than you are?

A. He is about 10 years and a few months older than I am.

Q. And are you married, Mr. Kara?

A. Yes, I am.

Q. What is your wife's name?

A. Sawsan, S-a-w-s-a-n, or commonly known as Susie, Kara. She's taken on our last name.

Q. What was her maiden name?

A. Salman. S-a-l-m-a-n.

Q. And does she have any siblings?

A. Yes, she does.

Q. What are their names?

A. She has three siblings, and her older sister, her name is Amao, A-m-a-o. She has an older brother, Ghazy, G-h-a-z-y. And an older brother named Bassam.

Q. And is Susie the sister of the defendant Bassam Salman?

A. Yes.

[360] Q. Your wife's older brother, Bassam Salman, is he similarly aged to your older brother, Michael?

A. I believe so.

Q. When did you first meet Susie?

A. Susie and I met in right around 2002, February of 2002.

Q. How did you meet?

A. We met through a common family introduction. My parents met a relative of hers, and we were introduced to one another that way.

Q. And when did you first meet Susie's brother, Bassam Salman?

A. I believe I took a trip out to Chicago to meet Susie first, and then also the family, in or around April of 2002.

Q. At some point, did you become engaged to Susie?

A. We did. Thankfully, we got engaged in June of 2003.

Q. June of 2003?

A. Uh-huh.

Q. And from the time of your engagement going forward, did your family, the Karas and the Salman family, spend time together?

A. Yes, we did.

Q. What are some examples of the time the family spent together?

A. We're all from Middle Eastern cultures, so it's very common that the families have to get to know one another, so [361] initially, my sister took a trip out to Chicago, shortly after – or along the same time that I took my first visit. Susie's family came out shortly thereafter to meet my family in the San Francisco Bay Area. And we had several chances to go out and visit them as well in Chicago.

Q. You indicated that the families have to get to know one another. Why is that?

A. I think when we think of marriages or unions, we think of not only the spouse/spouse relationship, we think of it as a family relationship.

Q. So the families are expected to be close?

A. We hope – yes, we hope, and we would like to expect that they become close, yes.

Q. Did they become close?

A. I believe we did. I love Susie's family very much.

Q. And did you observe Bassam Salman and your brother Michael interact during this time period of the family's getting to know one another and becoming close?

A. Yes, they did.

Q. And did they appear to be friends?

A. Yes, I think they became friendly, yes.

Q. Did you observe them spending time together?

A. Sure, yes, I did.

Q. Did Bassam Salman attend your wedding?

A. Yes, he did.

* * *

[365] A. He is also a friend of my brother's.

Q. What about all the way down on the bottom, there's an individual with the name Nabil Bahu with a photo. Do you know who that individual is?

A. Yes, I do.

Q. Who is that?

A. He is the – Sam Salman's brother-in-law.

Q. Then last question on this chart: If you see there are three down the left side, Roula, Rana and Rania Atiyeh. Do you know who those individuals are?

A. I know Miss Roula and Miss Rania. I've met both of them. I don't really know Rana.

Q. And how do you know those individuals?

A. Roula is married to Mr. Bassam Salman and is my sister-in-law. And Rania is her sister, and is Nabil's wife and somebody that I have met.

Q. Thank you. You can set that exhibit to the side. You said that you grew up in the Bay Area; is that correct?

A. Yes.

Q. Where did you go to high school?

A. I went to high school in the Sunset District here at St. Ignatius College Preparatory.

Q. And where were you go to college?

A. I want to college at UC-Berkeley.

[366] Q. And what year were you graduated from UC-Berkeley?

A. I graduated in 1993.

Q. And did you start work after graduating from UC-Berkeley?

A. No, I didn't.

Q. What did you do?

A. My brother fell ill during that time as a result of complications related to a surgery that he had had around that April or May of 1993 timeframe. So I stayed at home and helped my family to take care of my brother. He was in intensive care for several months. And along that time, I also took all of the – all the parts of the CPA exam and got my CPA during that time.

Q. That was productive.

A. Yeah.

Q. So your brother also lives in the Bay Area?

A. Yes.

Q. And after you spent approximately six months, I think you said, helping your brother recuperate, what did you do next?

A. I moved to New York and I accepted a position with a company that I had interned with, and that was Coopers & Lybrand, and I was working in their Manhattan office in the tax consultant group.

Q. So you decided to leave the Bay Area and go to New York?

A. I did.

Q. Why is that?

[367] A. I think – for several reasons. The primary reason was really to have a progression in my

life. I had lived at home all the way through college and had never gotten a chance to really feel independent. So I wanted the opportunity to do that. At the same time, I had dealt with quite a few issues surrounding the stress that my brother had put on our family. And I wanted to try and break free, away, if you will, and live my life independently without a lot of the stress that was coming along with it.

Q. You mentioned the stress involved with your brother. Prior to your move to New York to work with Coopers & Lybrand, did you ever observe your brother, Michael, abuse alcohol or drugs?

A. No.

Q. And after working at the tax consultant group at Coopers & Lybrand in New York, what did you do next?

A. I decided during the middle of 1995 to apply for business school. And – I wanted to get my masters in business administration so I applied to several schools and selected to go to the University of Chicago.

Q. And what were – what year were you graduated from the University of Chicago?

A. It was a two-year program, so I graduated in 1998.

Q. And did you work after graduating from the University of Chicago?

[368] A. I did.

Q. What did you do?

A. I took a full-time position in New York with who was known as Solomon Smith Barney back then, and it was a division of Travelers Group. The company then merged with Citigroup in 1999, and it became known as Citi.

Q. Then you started working for Citi as part of that merger?

A. Yes.

Q. How long did you work at Citigroup?

A. Approximately from 1998 through 2007, so about nine years.

Q. So when you first started working for Citigroup, where were you located at that point?

A. I was located in New York, and the first year was what was known as a generalist year – they allowed to you rotate into three different investment banking groups, four months each. So I got a chance to do rotations, in San Francisco as well as in London.

And then, when I got back, I was offered full-time positions in various groups and selected to go to the San Francisco Technology Group.

Q. Approximately what year did you begin in the San Francisco Technology Group?

A. In 1999.

Q. And how long did you remain in the Technology Group in [369] San Francisco?

A. I worked in that group – they eventually to Palo Alto. But through the Internet bubble, which I believe was in or around the middle of 2002.

Q. So what happened in 2002? Did you switch to another group?

A. I did. I was asked if I'd join the Healthcare Group within Citigroup at that time and specifically focus on biotechnology and pharmaceutical companies.

Q. And where were you located at that point when you began in the Healthcare Group at Citi?

A. Initially, I was located again in Palo Alto. Then we moved to San Francisco. And then finally, was at the end of '03, was asked to move to New York.

Q. Okay. So by 2003, you were located in New York, the Healthcare Group at Citi; is that correct?

A. Yes.

Q. And do you recall your home number in New York during that time period?

A. I do. It's 646-414-1525.

Q. And what was your title at that point in 2003 in the Healthcare Group?

A. I was vice-president of healthcare investment banking.

Q. And over time, did that title change? Did you move to the next level?

[370] A. Yes, I did.

Q. And what is that next level?

A. The next promotion I received was to director of investment banking.

Q. So during the period approximately 1995 to 2004, did you ever observe your brother, Michael Kara, abuse alcohol or drugs?

A. Yes, I did.

Q. Tell me about that. What did you observe?

A. It was around the time of 1999 or 2000. And I was living in corporate housing over at 1000 Chestnut here in Russian Hill. I received a phone call from my doorman indicating to me that someone who didn't look well said he was my brother, Michael Kara, and that he was asking to be let into my apartment.

Q. And what did you do, Mr. Kara?

A. I left my office, which was on California Street at that time, and I drove home. Drove home.

Q. And what did you do next?

A. I saw my brother in my apartment, and he didn't look very well. So I took care of my brother.

Q. And what happened after that?

A. After I – the next morning, when I felt he was okay, he promised that he was going to take care of himself, and I called his wife and called my dad to let them know that he was [371] safe. And he told me he would take care of himself.

Q. While you were a vice-president in healthcare investment banking and then a director, what were your duties and responsibilities at the Citigroup?

A. I really – I categorize my duties as an officer, which was part of a vice-president, into two categories. The first one was execution of transactions for corporate clients. And by transactions, I mean financings for companies. Whether they issue stock or issue bonds, we were the underwriters for those offerings.

And I was also then, as part of my responsibilities, asked to call on the companies that were assigned to me and start to begin to develop relationships with the CEOs and the CFOs and senior members of the team.

Q. And when you say "call on", what do you mean by that term?

A. I think it's analogous to like a stockbroker. They're given clients or assigned client names, and you begin to develop relationships with them in the hopes that you can garner mandates or engagements in order to execute transactions for them. So that Citigroup can garner fees from those transactions.

Q. And what do you mean by a mandate?

A. A mandate is when a corporate client actually assigns Citigroup or assigned a specific team within Citigroup to work [372] on its behalf, either in the form of an underwriting or a merger or acquisition type of situation.

Q. So Mr. Kara, what were some of the companies that you called on during at that time period?

A. I, as I had mentioned, pharmaceutical and biotechnology companies. Some of my pharmaceutical clients were Merck, Schering-Plough; and biotechnology companies in the Bay Area, they were Genentech, Gilead Sciences. Endo Pharmaceuticals – not here in the Bay Area, but other ones – as well as Protein Design Labs and Pain Therapeutics.

Q. And how would you generally generate fees with these companies?

A. Again, you would work towards solidifying a relationship with the company. And when a – you would, what we call, pitch ideas or market ideas to the company, about raising money, about buying other companies. And the companies, they're all dynamic and involved, so at certain times their board members and senior decision-makers decide to conduct a transaction, and they engage the help of Citigroup.

Q. And how would you define confidential nonpublic information?

A. It's information that's generally not known to the large investing public, and it's information that, if disseminated to the large public, could have a significant impact on the stock price of a corporation.

[373] Q. And would you come across nonpublic confidential information in the course of your job at Citigroup?

A. Yes, I would.

Q. And did Citigroup provide you training on how to handle confidential nonpublic information that you received from clients?

A. Yes, they did.

Q. Can you describe generally some of the types of training that you received at Citigroup?

A. The training was immediate, and – if not even before we had an opportunity to take our seats and begin working on behalf of clients. So as a generalist, they conducted a large, six-week training program, and at least three or four days during one week, we went through compliance issues and expectations of employee conduct and how to treat confidential information.

And then every year thereafter, we would have very regular training and reminders about how to conduct yourself and how to hold confidential information closely.

Q. I'd like to show you now what's been marked as Exhibit 21, if you could, please, locate it in the

exhibits that I've given you. And take a moment to look at it and let me know if you recognize that document.

A. Yes, I do.

Q. Mr. Kara, what is Exhibit 21?

[374] A. This is looks like the employee – what we call – commonly called an employee handbook or code of conduct for Citigroup employees.

MS. DOWLING: Your Honor, I'd like to move Exhibit 21 into evidence.

MS. SHIFMAN: Objection, your Honor, hearsay.

THE COURT: Objection overruled.

MS. SHIFMAN: I'm sorry, I withdraw the objection. Excuse me.

THE COURT: Okay. It is admitted. (Trial Exhibit 21 received in evidence)

MS. SHIFMAN: Thank you.

MS. DOWLING: Thank you, your Honor.

BY MS. DOWLING:

Q. Mr. Kara, if you could please turn to Page 2 of Exhibit 21.

A. Yes, Ma'am.

Q. At the top, you see that there's a date.

Maybe if you could highlight or blow up that portion so the jury can see it.

What is the date at the top of this page?

A. It's May 2006.

Q. And were you an employee of Citigroup in May of 2006?

A. Yes, I was.

Q. So were you subject to this code of conduct?

[375] A. Yes, I was.

Q. If you could turn to Page 17, please.

A. Yes.

Q. And maybe, Maryam, if we could blow up the heading, Insider Trading Area?

Was this part of the policy at Citigroup?

A. Yes, it was, Ma'am.

Q. And if you could please read that first paragraph.

A. Sure.

"Citigroup policy and the laws of many countries prohibit trading in the securities (including equity securities, convertible securities, options, bonds, and any stock index containing the security) of any company while in possession of material, nonpublic information (also known as 'inside information')

regarding the company. This prohibition applies to Citigroup securities as well as to the securities of other companies. It applies to transactions for any Citigroup account, client account or personal account. A personal account is any account in which you have a financial or beneficial interest, or the power to affect or ability to influence trading or investment decisions, either directly or indirectly. Personal accounts typically include accounts of spouses, domestic partners, children and other members of your household, and accounts over which you have investment discretion."

[376] Q. Mr. Kara, in your own words, what did this mean to you?

A. Almost what it says, Ma'am, if I could just paraphrase it. It is that we are prohibited, that Citigroup employees were prohibited from using information that they obtained as part of their work and that was confidential and material, to transmit that information or disseminate it to people outside of Citigroup.

Q. Thank you.

And, Maryam, if we could go back to the full page, I want to focus.

Mr. Kara, if you could focus your attention now on the first full paragraph under investments and outside activities on the right side of the page. Do you see that?

A. Yes, I do.

Q. If you could just read that first paragraph, Mr. Kara?

A. Sure.

"It is also illegal in many countries to 'tip' or pass on inside information to any other person if you know or reasonably suspect that the person receiving such information from you will misuse such information by trading in securities or passing such information on further, even if you do not receive any monetary benefit from the tippee."

Q. Did you understand this policy to apply to you?

A. Yes.

Q. Can you give the jury some example of what, in your own

* * *

[383] **A** Yes.

Q Is that likely to be material information?

A Yes, it is.

Q Why is that?

A Just to put it in simple terms, if a company is interested in buying another company, typically they will purchase that company for a substantial premium over its certain share price. If that information is disseminated to the general public, it will likely cause

a significant appreciation in the stock of the company, of the target company.

Q Okay. And now I'm going direct your attention to the middle portion of the page, under "Prohibition on Trading on or Tipping Material, Non-public Information."

(Document displayed)

MS. DOWLING: Thanks, Maryam. And if you could highlight, please, the third bullet.

(Document highlighted)

BY MS. DOWLING:

Q And if you could read that, Mr. Kara, please?

A (As read)

"If you trade on or tip material, non-public information as an employee working in the securities industry, you can expect to be held to a high standard in determining whether you knew or should have known that the source of the [384] information was a corporate insider or some other person acting improperly (i.e. acting in breach of a fiduciary, statutory, or other legal duty)."

Q And Mr. Kara, what is your understanding of what "tipping" means?

A Tipping is providing material, confidential, non-public information to someone for their benefit.

Q Okay. And you can set that exhibit aside, please, and we are going to turn now to the next exhibit, Exhibit 25.

Take a moment and got that exhibit out, and let us know when you have looked at it, please.

A Yes.

Q And, do you recognize this document, Mr. Kara?

A I do.

Q And, could you identify what this document is, please?

A This, again, is a memorandum to all CIB employees. That's corporate and investment banking employees. And again, it's from our legal team.

And it's a reminder about our obligations to safeguard and protect material non-public information.

MS. DOWLING: Your Honor, I move to admit Exhibit 25.

MS. SHIFMAN: No objection, Your Honor.

THE COURT: 25 is admitted.

(Trial Exhibit 25 received in evidence)

(Document displayed)

[385] **BY MS. DOWLING:**

Q Mr. Kara, we're just going to look at one paragraph on this page. If you could look at the third paragraph.

(Document displayed)

Q If you could read that, please?

A (As read)

"You are reminded that you may not misuse confidential or material, non-public information regarding an issuer's securities. Trading on material, non-public information, or conveying such information to anyone improperly "

Otherwise known as "tipping . "

" violates firm policy and may constitute a violation of federal or other insider trading laws, European regulations on market abuse, or other applicable laws."

Q Thank you, Mr. Kara. And you can set that exhibit to the side, please.

Mr. Kara, while employed at Citigroup, did there ever come a time when you tipped, when you shared material non-public information with anyone outside of Citigroup?

A Yes, there was.

Q And what did you do?

A Um, I began sharing material non-public information with my brother, Mounir Michael Kara.

Q And why did you do that?

A It happened, ma'am, over a series of years. And, I would [386] call it sort of an evolution of the way that I was transferring information to my brother.

When I entered into the healthcare investment banking group in 2002, I didn't have any healthcare experience. And specifically, I knew nothing about science, and knew nothing about the general healthcare industry. My brother had a scientific background, and – an undergraduate degree in chemistry and a toxicology background that I thought would be useful in helping me learn about the drugs and about the company that I was now going to be responsible for.

At that time, I was a vice-president. And as I had mentioned, I was an officer of the corporation. And a lot of the meetings that I would be asked to begin really involved CEOs and CFOs of large public corporations. And I didn't want to come across as somebody that didn't have any knowledge.

So, I began sharing with my brother information about the companies, information – and asking him questions about the drugs, how they worked, how the science behind it worked.

And, at that time, gave him clear instructions that information that I was sharing with him was

confidential, and that I was really just trying to gain an industry knowledge through his help.

What I would call Phase Two of that would be that those conversations, unfortunately, became much more relevant in our life because my father was diagnosed with cancer in late 2003, [387] early 2004. And, in fact, he was diagnosed with two different types of cancers. Non-Hodgkins lymphoma, and then glioblastoma multiforme, which is a terminal form of brain cancer.

My discussions with my brother then began to gravitate much more towards companies that were focused in the oncology and pain-management space. And I was looking for – we were looking, my brother and I, for companies that had different treatment options that could potentially benefit my dad.

As it turned out, a lot of the companies that I was working with and was a lead coverage officer for had drugs that were going to be treated – that could help my dad. And I, in fact, contacted some of those companies to see if we could use compassionate use for some of the medications for my dad, because we were trying to save his life.

Q Okay.

A And, and last, the third evolution is after all of that, my brother, once – after my father died, my brother's discussions began to become much more targeted. And began to be much more focused around

asking me about – specifically about companies and more towards a business end of it.

And I confronted him, and asked him point-blank, "Are you trading in these companies?" And he flat-out denied it, and he swore on his daughter's life that he wasn't trading in it.

It then – but he – he would go away for a while and not [388] ask me questions, and then he would come back and he would ask me questions again. I tried to deflect it. It got to the point where I told my wife no longer to take his calls at home. Tried to avoid his phone calls, wouldn't reply to his e-mails, because I just didn't want to talk to him.

It got to the point where it was so persistent and so nagging that to get him off my back, I finally caved in. And that was the third what I would call phase of the type of information that I was sharing with my brother, where I knowingly tipped him, to get him off my back, and to benefit him.

Q And, you wanted to help your brother, sharing that information?

A Yes, that definitely was – I knew that by tipping him, that I was helping him.

Q And in helping him, you were helping yourself. Right?

A I –

MS. SHIFMAN: Objection; leading.

THE COURT: Overruled.

THE WITNESS: I – I just didn't know – I repeatedly asked him to please just leave me alone, and that what we were doing, that – I became very uncomfortable with it. And, he wouldn't stop. And, yes. The way that I thought I was helping myself was just by getting him off my back, and fulfilling whatever needs he had. You know, and I expected [389] that he was likely trading on it.

BY MS. DOWLING:

Q And some of the information that you and your brother exchanged, did that help you in a business development capacity, with regard to the companies you were calling on?

A Initially it did. His information was incredibly helpful. And I – I was kidding myself in thinking that what I was doing was okay, because I assumed, oh, I'm likely benefiting Citigroup because now I'm becoming this much more intelligent officer, and I can have these fruitful scientific discussions with the officers of these public corporations.

And I was completely naive and gullible to assume, first and foremost, that that was okay. But, second, to continue to do it, after, you know, after the passing of my dad and at the point where I noticed that my brother's questions were becoming much more targeted.

Q And in that Phase Three, as you labeled it, in that time period, you knew that your brother was trading on these companies. The stocks.

A He never disclosed to me that he was trading, but I fully expected that he was trading it, because the types of questions that he asked indicated to me that it was – it was the behavior of somebody that was trading in security – the questions were indicative of someone that was trading in securities. I didn't want to ask him, you know. When I did [390] ask him, he denied it.

But at the point where I decided to give him information with the intent to help him trade I didn't want to ask him again, "Are you trading," because I knew what the answer was going to be, and that was going to be "Yes."

Q What were some of the biotech companies and drugs that you discussed with your brother, in order to learn more about the biotechnology area?

A Initially my main focus was really in the – and it graduated with my dad or it progressed with my dad's illness. I focused on oncology companies, and focused on pain-management companies, and large pharmaceutical companies.

So, around the time of my dad, we looked at a company called American Pharmaceutical Partners, or APPX. And they had a lead drug called Abraxane, which helped reduce the cytotoxicity or the toxic effects of chemical therapeutic drugs to patients, so

that patients could get more drug without having all of the residual harm that comes with traditional chemotherapy.

I discussed Genentech with my brother, because my father was on one of their lead drugs called Rituxan for non-Hodgkins lymphoma. That was part of his therapy. I also discussed Schering Plough's drug called Temodar, which was very novel and still in discovery, in the discovery stage. And it was the first-of-its-kind oral treatment for patients with brain [391] cancer, and was enabling patients to have several months of extended survival who are terminally ill.

We also discussed Endo Pharmaceuticals, which was a client of mine. And they had several medications that my family eventually used, including Lidoderm, which was a patch for low back pain. And they also had end-of-life pain, for my dad when he was terminally ill.

Q So some of the companies that you discussed with your brother, they either were or became Citigroup clients? Is that correct?

A Yes. Many of them – I would say almost all of the companies that I discussed with my brother at – didn't necessary – weren't necessarily companies that we earned fees from, but they were almost all companies that we spoke to. And had an active dialogue with.

And, we more than likely received material non-public information from those companies.

Q And why were you comfortable sharing non-public material information with your brother?

I guess that kind of dovetails with the Phase Two time period you were talking about earlier.

A Yeah. Again, I apologize for being what I would call incredibly naive, relaxed, unguarded. But I just never could imagine that my brother would take it upon himself to trade in the companies that I was covering and had – you know, we [392] share the same last name, he knew how important the job was to me, how much I cared about it.

And, when I suspected it, and asked him, I warned him initially, and then repeatedly told him that the information was confidential. And when I asked him, "Are you trading?" he swore to me that he wasn't.

Q Mr. Kara, you spoke of your father's illness. Did he pass away at some point?

A He did.

Q And did your family do anything to commemorate your father's life?

A Yes. Shortly within what we call a 40-day mourning period, we had a memorial service for my father after his funeral, which was on November 17 of 2004.

Q And do you recall Mr. Bassam Salman attending any of these events?

A I believe Mr. Salman attended my father's memorial service.

Q And did Mr. Salman visit with your father before his passing?

A Yes. They loved my dad, and my father loved them very much. And yes, I think he came to – when my dad was in very critical condition, came out to see if he was okay.

Q Mr. Bassam Salman visited your father when he was ill?

A Yes, yes.

[393] **Q** And at this point before your father passed away – in 2004, was it?

A Yes.

Q At this point, you had known Susie Salman for a couple of years at that point. You said you met in 2002, correct?

A Yes.

Q So by the 2004 time period when Mr. Salman is visiting your father who's ill, did the families know each other quite well at that point?

MS. SHIFMAN: Objection; calls for speculation.

THE COURT: Overruled. You may answer, if you know.

THE WITNESS: And I'm sorry, ma'am. Because of the objection, I lost the question. Can you repeat the question for me?

BY MS. DOWLING:

Q Yes, I can. So, in 2002, you and Susie Salman met, correct?

A Yes, we did.

Q And you and Susie Salman actually met at the – the initial meeting was at Mr. Salman, Mr. Bassam Salman's house. Correct?

A Yes.

Q So you met them at the same time.

A Yes.

Q So by 2004, moving forward in time, your families, the [394] Kara family and the Salman family, they have gotten to know each other very well. Correct?

A Yes. There were numerous opportunities. And in fact, as I mentioned, we got engaged in 2003. And we had to postpone our wedding three times because of my father's illness.

And, our original wedding date was August of 2004. And, at that point, my dad was in a wheelchair, and couldn't walk. So we postponed the wedding. And

then, it's customary to wait an extra year, so we didn't get married until July of 2005.

Q And, did Mr. Salman know what you did for a living?

MS. SHIFMAN: Objection; calls – this witness can't possibly know what's in the mind of somebody else.

THE COURT: Overruled. You can answer, if you know.

THE WITNESS: I don't have a specific recollection of talking to Mr. Salman about being an investment banker. I do know my brother announced that to everybody, and it was actually my surprise, at my wedding.

But, I had told Mr. Salman that I worked generally in the finance industry. For Citigroup. And that, you know, my responsibilities were really to help companies raise money. I did not get into specific details about what I did.

BY MS. DOWLING:

Q So he – you spoke with Mr. Salman about being in finance in general, Citigroup in particular. And that you worked on financing? Is that –

[395] **A** Yes.

Q That's correct?

A Yes.

Q But you didn't use the term investment banker (Indicating quotation marks), is that correct?

A That's correct.

Q Why didn't you use that particular term to describe to Mr. Salman what you did for a living?

A I – I didn't like to tell people what I did for a living because I didn't want people to make assumptions about me as a person, and about my income level, or have ideas in their mind about what kind of a person – you know, even back in 2002, investment bankers had terrible reputations. So, I tried to not share with anybody what I did for a living. I didn't want them to make any assumptions about me.

Q Okay. And, Mr. Kara, how did your brother Michael react to your father's death in 2004?

A Much like the whole family. We were all extremely depressed, but I think my brother was suicidal at the time, and took – took my father's death very, very, very – it deeply affected him.

Q Were they very close?

A Yes. Very, very close.

Q Did he help care for your father in his later years quite a bit?

[396] **A** My brother did, yeah. And my brother – and my dad really – what I've come to know, my dad shielded us very much from the – the issues that

involved my brother. So, it was a mutual caring relationship.

And, you know, my brother had my dad working with him, as part of his remediation company. And, you know, my dad adored Mounir, and Mounir adored my dad.

Q And did Mounir take on some financial responsibilities for your dad during that time period?

A I believe he did. He was always very generous with his parents, and with family. And my brother – I – I came to share in some of those responsibilities.

But yeah, there was a point where I knew my brother had been helping my family for – for an extended amount of time. And I talked to him, and I told him I wanted to participate in that. So –

Q And had Mounir in the past – Michael, in the past, had he helped you financially when you were growing up?

A Yes. I think, you know, to some extent, he did help finance part of my business school education.

Q You indicated earlier that your brother was suicidal at the time of your father's death. What do you mean by that?

A It was around the Christmas holidays of 2004. And it was within a month of my dad's funeral. I was at my brother's house. And, he came out of his room, and sat down on the [397] couch next to me.

And as I saw him walking in the room, he had a gun in his right hand, and he had a clip in his left hand, but he also had a clip in the gun. And he sat down next to me, and he just broke down and began to cry. And put the gun in his mouth. And said, "I – I want to be with Dad."

Q So, did you know that this was all about your father's death?

A That's how I – yeah. That's how I interpreted it.

Q So, what did you do in response?

A I grabbed the gun out of my brother's hand; I put it to the side. I hugged my brother. And we started crying together.

Q Did you ever see Michael do anything along those lines after that point?

A No.

Q Did you ever observe him to do or say anything else that caused you to be concerned about his well-being after that point?

A Um, up to that point?

Q After that point.

A No, I don't think so.

Q Mr. Kara, let's switch topics. Earlier you had mentioned a company called Protein Design Labs. What is Protein Design Labs?

[398] **A** It was a biopharmaceutical company that was based here in Fremont, California, and focused on developing drugs to treat autoimmune diseases and anti-inflammatory diseases.

Q And was Protein Design Labs a Citibank client?

A Yes, it was.

Q And did you personally do any work for Protein Design Labs?

A Yes, I did.

Q What kind of work did you or you and Citigroup do for Protein Design Labs?

A We executed several transactions for the companies. Primarily around financings. And we also advised them on mergers and acquisitions.

Q And over what time period did you work with Protein Design Labs?

A I think it was one of the first accounts that I was assigned, so I would say in that 2002-2003 time frame, all the way through my departure from Citigroup, so the middle of 2007

Q So this would have been one of the early companies that you called on?

A Yes.

Q To establish a relationship with?

A Yes.

Q And it worked because you did financings with them in the

* * *

[401] **A** Yes, I was.

Q And at the top of the memo it says "CONFIDENTIAL," in bold letters. Why is that?

A Again, this is in relation to a potential financing of an acquisition, so that type of information would be treated as confidential material, non-public information within the team.

Q And can you describe again what's being conveyed by this memo?

A Yes. This is a description of the financing proposal that we have been asked to give to Protein Design Labs and with respect to the acquisition of ESP Pharma.

Q And what is the date of this memo, Mr. Kara?

A It looks like January 11, 2005.

Q If you look at the very last paragraph of the memo, maybe Maryam could blow that up or enlarge it, if you could read that sentence, please.

A (As read):

"The Citigroup team is in dialogue with PDLI about acting as a financing agent for any contemplated

transaction. We will be meeting with the PDLI management team on January 12, 2005 to discuss the potential financing alternatives."

Q And to your knowledge, did that meeting, the January 12, 2005 meeting referenced, did that ever happen?

A Yes, it did.

Q And how do you know that?

[402] **A** I was the person that actually set up that meeting.

Q And who, and who –

A And I also attended it.

Q Oh, you attended it? And who else was at the meeting?

A I had invited a person from equity capital markets, my partner there, Bruce Wu. I had also invited Mike Simon, the head of our life sciences team. Mariano Gaut was there, equity capital markets partner. And also a junior associate on the account.

Q And, what was the purpose of that meeting?

A The purpose was really for – from my perspective, it was for us to express our interest to the CEO of PDLI that we would like to act as their financing agent with respect to ESP Pharma.

At that point, ESP Pharma was a private biotechnology company that Citigroup was engaged separately to sell. And, PDLI was very interested in buying the company. So, we had gotten released from conflicts and were able to act both as the seller of the private company, and as well as a potential financing agent for the buyer of that company.

Q And what happened at that meeting with the CEO?

A We expressed to him our interest in working with him, regarding that transaction. And, he conveyed to us in his interest – his interest in actually being the party that wins the – the auction process for the sale of ESP Pharma.

[403] **Q** Ands did you take any steps to help win that business at that meeting?

A I did.

Q What did you do?

A I knew that the CEO of the company enjoyed white wine. So at that time I was not a wine connoisseur, and my brother knew a lot of about wines, so I'd asked him for his help in obtaining a couple of bottles of white wine that I took to the dinner for the CEO.

Q And where did you get the wine?

A I believe we got it in San Francisco, at one of the local wineshops here along the pier.

Q Do you recall what kind of wine you got?

A Yes, two bottles of white. One was a Kistler Chardonnay, and the other one was a Marcassin Chardonnay.

Q I take it, those were nice wines?

A They were expensive. So, I hope they were good.

Q And was PDLI's potential acquisition of ESP Pharma and Citigroup's provision for any financing of that deal all non-public information at that time?

A Yes.

Q And was material information?

A Yes.

Q Why is that?

A Because, had anyone – had investors realized that PDLI [404] was contemplating a $500-million-plus size acquisition along with a related financing, that definitely would have caused a reaction to PDLI's stock price.

Q You told us that Michael had helped you pick out the wine for this important meeting you were having with the CEO. Did you and Michael discuss PDLI?

A Yes. We discussed – we had discussed PDLI as early as back in 2002, and Michael knew that I was developing a close relationship and a friendly

relationship with the CEO of the company. And he knew about the dinner.

He asked me what the dinner was about. And I said, you know, "Please keep me in your prayers, and I hope we can win this transaction because it will mean a significant amount of fees for Citigroup, and hopefully it will help me in my career."

Q And after the meeting, did you follow up with Michael and continue to provide him information about the transaction?

A I did. I thanked my brother for the bottles of wine, and told him that the meeting went really well, and I hoped that a transaction would be consummated.

And then after that, I regularly updated him – he would call me and ask me, "How are things going? How's work?" You know, something to that effect, often. And I would feel extremely comfortable in sharing updates about my work and about these types of projects for clients that I was working

* * *

[412] at Sam's.

Q And did you get that information from Tiger or from –

A From, I think, Susie.

Q From Susie? Okay. All right, thank you. Mr. Kara, did you share any confidential information about Pain Therapeutics with your brother, Michael?

A I did.

Q And what information did you share with your brother, Michael?

A I told him about the upcoming follow-on transaction that we were expected to have should the Remoxy data be positive.

Q Let's switch now to another company called Bone Care International.

A Yes.

Q Are you familiar with this company?

A Yes, I am.

Q And were you the person at Citi that was responsible for working with Bone Care International?

A No, I was not.

Q And who was, to your knowledge?

A It was a colleague of mine named Henry Schwake.

Q Were you aware that Bone Care was a Citigroup client?

A Yes, I was.

Q And, how were you aware that Citigroup had Bone Care as a client?

* * *

[415] **Q** You said earlier that you were aware that Bone Care International was a client of Citigroup. In the April 2005 time period, were you specifically aware that Citigroup was engaged on a transaction for Bone Care International?

A No, I was not. I don't recall, sitting here today, knowing that. But, it's the kind of thing that I could have very easily learned.

Q So, do you recall having any conversations with your brother, Michael Kara, about Bone Care International?

A No.

Q Would you exclude the possibility that you may have had conversations with Michael Kara about Bone Care International?

A I can't – I can't exclude it.

Q I want to turn now to another company, called Endo Pharmaceuticals. Are you familiar with a company called Endo Pharmaceuticals?

A Yes, I am.

Q And what is Endo Pharmaceuticals?

A I'm sorry, we're done with –

Q Yes, you can set that aside.

A Endo Pharmaceuticals is a specialty pharmaceutical company that focuses on developing drugs in the pain management sector.

Q And did Citigroup do any work for Endo Pharmaceuticals?

A Yes, we did several transactions for them.

* * *

[420] Pharmaceuticals.

Q If we could move to about halfway down the page, please.

(Document displayed)

Q Okay. Do you see in the middle of this enlargement it says "Project Name, Project Everest Tibet"? What does that mean?

A As part of our safeguarding policies as Citigroup, we would assign project names to merger and acquisition assignments to protect the integrity of the information that we were – that we had obtained.

We oftentimes would take a look at the first initial of each of the companies that are involved. And we would create project names based on that. So "Everest" was for Endo Pharmaceuticals, and "Tibet" was for TEVA pharmaceuticals.

Q And you said, "protect the integrity of the information." What do you mean by that, Mr. Kara?

A Again, it's a safeguarding technique that we would use, because our goal was to not have people that didn't need to know about the transaction even within Citigroup know about it.

So we would create project names, to not share what the transaction was about with others, or who the parties involved were.

Q And was TEVA's potential acquisition of Endo Pharmaceuticals confidential information as of June 10, 2005?

[421] **A** Yes, it was.

Q Was it material information?

A Yes, it was.

Q Why is that?

A Because had a larger public audience learned that at the TEVA Pharmaceuticals was interested in buying Endo, it would have likely created a significant stock price jump in Endo Pharmaceuticals' stock.

Q Did you discuss TEVA's potential acquisition of Endo Pharmaceuticals with your brother, Michael Kara?

A Yes, I did.

Q Can you please describe the nature of those conversations with your brother?

A It was – I was sitting at his kitchen table, going through – or learning about the transaction in

California. And had learned – gotten a call from several deal team members that Endo had entered into dialogue with TEVA pharmaceuticals about potential e-mail being sold to them.

So, I took the call from my brother's house. He overheard it. Came to me and said something to the effect of, "Hey, what's going on?"

And I said, "Great news " I would have said something to the effect of "Great news, looks like Endo may be sold, hopefully to TEVA. We'll see where it goes."

Q Did Michael ever tell you that he was buying or selling [422] Endo securities?

A No.

Q You can set that exhibit to the side, please.

(Request complied with by the Witness)

Q Mr. Kara, I want to turn back to the – the time of your wedding. What was the date of your wedding?

A July 9, 2005.

Q And where were you married?

A We were married in Chicago, Illinois.

Q I would like to show you now what's been marked as Exhibit 89. If you could take a look at that, and let me know if you recognize it.

(Request complied with by the Witness)

A Yes, I do.

Q What is that?

A That is a picture of some of our wedding party in front of the church that my wife Susie and I were going to be married at.

Q And is it a fair and accurate depiction of your wedding celebration, on or about July 9, 2005?

A It is a very small portion of a large wedding.

Q But, accurate of the small portion?

A Yes. Yes.

Q Okay.

MS. DOWLING: Your Honor, I would like to move [423] Exhibit 89 into evidence.

MS. SHIFMAN: No objection, Your Honor.

THE COURT: Thank you. 89 is admitted.

(Trial Exhibit 89 received in evidence)

(Document displayed)

BY MS. DOWLING:

Q Mr. Kara, where are you located in this photo?

A I was the smiling person in the middle of the photograph, with a white tie, and a white flower on my lapel.

Q And is your brother Michael in this photo?

A Yes, ma'am.

Q Where is he located?

A He's directly across from me. And I don't know if the jury can see it. There's a little bit of a red outline of his tie. You've got his profile kind of turned towards the audience, but he's the closest male person in front of me.

Q Where the arrow is now pointing (Indicating)?

A Yes, ma'am.

Q Okay. And if you could look at the back of the photo, there's a yellow circle around an individual. Do you recognize that individual?

A Yes, ma'am.

Q Who is that?

A That's my brother-in-law, Bassam.

Q And, during your wedding celebration, did you observe [424] your brother Michael and Bassam Salman interact?

A I did.

Q And what did you observe?

A And this is around the time of the wedding celebration, ma'am?

Q Yes, during the wedding celebration.

A So we had a – numerous times to all get together. I mean, it was celebratory, and it was getting family – all about getting the families together. So we had a cruise dinner after our rehearsal dinner that we hosted for very close family and out-of-town guests. And, we also had a dinner the night before the wedding that we all got together at.

And, on the day of the wedding, my brother, acting really on behalf of my dad, or as representative of the elder in the family, would have gone to my brother-in-law's house – Ghazy Salman, because he's the oldest brother, to go and request their sister's hand, my wife, Susie, in marriage for a final time, and have the families agree to that wedding.

Q So this became your brother's duty, because your father had passed away?

A Yes.

Q So he went to Susie – your wife's – older brother's house?

A Yes.

* * *

[429] e-mail that we looked at earlier, with your brother, Michael?

A Yes. Yes, it is.

Q And you indicated earlier that your brother had taken on the role of your father during the time of your wedding.

Were there other cultural reasons why your brother would have interacted with Bassam Salman and the Salman family?

A I have – I think it's customary in the Middle Eastern culture that when you get married, it's not only a union of the two people in the party, but it is also a union of the families.

So part of our traditions, in order to finally get married you need not only the sign-off of the bride and groom, but you need the sign-off of the family to agree to accept the marriage.

Q You can move that exhibit to the side.

MS. DOWLING: And we're finished with that exhibit, Maryam. Thank you.

BY MS. DOWLING:

Q Mr. Kara, who was the best man at your wedding?

A It was my brother.

Q And did he give a speech at your wedding?

A Yes, he did.

Q And did he talk about your job during that speech?

A Yes, he did.

Q What did he say?

[430] **A** I was actually very surprised. But, he put significant emphasis on my career, and said I was an investment banker and, you know, not just a normal guy, that I was an investment banker, whatever that meant to him. And, took me a little bit by surprise.

But, he was talking a lot about my career and about the accomplishments that I had. And I know he meant it in a way that he was very proud of me. But, it was something that kind of, you know, took me back, took me a little bit by surprise.

Q So he was proud of you, your brother?

A That is how I interpreted it, yes.

Q Okay. I want to jump forward now to the beginning of 2006 time period.

A Uh-huh.

Q Are you familiar with a company called Andrx Corporation?

A Yes, I am.

Q And what is Andrx Corporation?

A Andrx Corporation was a specialty pharmaceutical company that was based here in the United States.

Q And in the January 2006 time period was Citigroup doing any work for Andrx, or relating to Andrx Corporation?

A Yes, we were.

Q And who did Citigroup represent during that time period?

A We were representing a company called Wockhardt Pharmaceuticals. It was an Indian specialty pharmaceutical [431] company. And we were representing them in the potential acquisition of Andrx.

Q And did you have any role in working with Wockhardt?

A Yes, I did. I had just previously concluded working with them for the prior six months on an unsuccessful attempt to buy another specialty pharmaceutical company, called Alpharma.

Q If you could turn now to Exhibit 4, please. Take a moment to look at it, and let me know if you recognize it.

A Yes.

Q And what is this document, Mr. Kara?

A This is a series of e-mails among Citigroup employees that were on the working group team for Wockhardt Pharmaceuticals. And, were looking at potential acquisition of Andrx.

Q And did you receive this e-mail?

A Yes, I did.

Q And what is the date of this e-mail?

A The latest one was on January 11, 2006.

MS. DOWLING: Your Honor, I would like to move Exhibit 4 into evidence.

MS. SHIFMAN: Continuing objection, Your Honor.

THE COURT: All right, objection overruled. 4 is admitted.

(Trial Exhibit 4 received in evidence)

(Document displayed)

* * *

[435] **Q** If you could read that paragraph, please.

A (As read)

"W is paranoid about confidentiality – B of A/Andrx have indicated they would break off discussions in the event of a leak."

Q And what did you understand that to mean, Mr. Kara?

A Quite simply, what it said. Bank of America is the reference to "B of A." They were Andrx's advisor. That they wanted to keep this, the knowledge of – of Wockhardt's interest in Andrx very confidential, and

that they would potentially break off the deal in the event of a leak.

Q And did you consider this information to be confidential?

A Yes.

Q Non-public?

A Yes.

Q And material information?

A Yes.

Q If you can turn back to the first page, please. (Request complied with by the Witness)

Q You indicated that this first e-mail had been forwarded to Ross MacIntyre. And, the first paragraph says (As read): "re confidentiality: we should start using project name and code names on all e-mails and memos immediately."

What did you understand that to mean?

A As I've mentioned today, ma'am, typically when we are [436] mandated on a merger or acquisition, we, as a – as a proper safeguard policy, would assign a project name with code names for the target and the acquirer in order to protect the confidentiality of that information. And to make sure that only people who needed to know even within Citigroup actually knew about the deal.

Q And did you continue to work on Wockhardt's potential acquisition of Andrx after January 11th?

A I did.

Q And what happened?

A Oh, excuse me. After – after January 11, I did just for a short time, and then I was actually asked to no longer work on the account.

Q So you worked on it some period past January 11th, and then you no longer worked on the transaction?

A I was – I helped – what ended up happening was I was – Citigroup had gone and hired a new person that was going to be focused on the specialty pharmaceutical sector.

Q Uh-huh.

A His name was Dung Nguyen. And Trygve Mikkelsen, the head of M&A, asked that Dung supersede me in terms of having primary responsibility on the account.

As the transaction went forward, and because of my prior knowledge of Wockhardt and its financing history and the complications associated with an Indian buyer buying a U.S.

* * *

[440] **A** Yes. At Citigroup, it was.

Q And did you discuss being removed from this transaction with your brother Michael?

A I did.

Q And what did you tell him?

A I told him something to the effect that I was really pissed that I was taken off of this account. Specifically, that it was an account that I had busted my butt on.

And I had even been at home in December of 2005, previously, when we found out that we didn't win the last deal for Wockhardt, with a different pharmaceutical company. And so my brother was aware that we had lost a deal for Wockhardt as early as 2005. December of 2005.

Q And why did you have these discussions with Michael in early 2006 about this transaction?

A You know, as I described the nature of my relationship with him, he sort of – you know, he became very interested in my career, became very interested in how I was doing. And, he was somebody that I viewed as my friend, and somebody that I could count on to sort of vent about my career.

It just – I got so comfortable – naively comfortable and completely unguarded about my relationship with him, that it felt like there's no possible way he would do something. You know, that that – passing that information to him was like talking to a sound – you know, to a soundboard.

* * *

[443] what I thought was "closed" meant "close."

Q And what is a lucite?

A A lucite is a little plastic trophy that investment bankers make when a deal gets closed. And we use it as a kind of an affirmation of the deal we just finished.

Q And, did that deal ever take place?

A Yes, it did. But it was with a different buyer.

Q Okay. Thank you. You can set that exhibit to the side, please.

(Request complied with by the Witness)

Q I want to turn now to another company, called United Surgical Partners International. Are you familiar with a company called United Surgical Partners International?

A Yes, I am.

Q Is it also known as USPI?

A Yes.

Q And what is it?

A It is a company that's in the healthcare services space. And was a client of Citigroup's.

Q And in the summer of 2006 time period, was Citigroup performing any work for USPI?

A Yes, they were.

Q What was it doing?

A Citigroup was representing their largest shareholder, a private equity firm, that was looking to potentially buy the [444] entire company of United Surgical Partners.

Q And were you working on this transaction for –

A No, I was not.

Q And how did you come to learn that Citigroup was advising a company on a purchase of USPI?

A I learned it from my colleague, Daniel Decelles.

Q And what was the company that was looking to purchase USPI?

A It was – I apologize, the name I'm blanking on, but it was a private equity – their lead shareholder was a private equity firm that was looking to buy the company.

Q And, about approximately when did you – do you recall learning about this transaction?

A I recall learning about it during the summer, kind of end of August, early September of 2006.

Q And did you have discussions with your brother about USPI?

A I did.

Q And what did you tell him?

A Initially, the discussions started over a CNBC show at his house and we were watching something about leveraged buyouts. And my brother became interested in understanding who conducted leveraged buyouts.

And I explained to him that a company like USPI which had a significant shareholder, the shareholder could come and do [445] an LBO. And the conversation really revolved around that shareholder, because at that time I had learned from my colleague, Dan Decelles, that he had been invited to join a car club that was being run by a gentleman named Dan Quealy, that was a partner of the private equity fund. And, that's how the conversation actually started.

Later, my brother, around the late August/early September time frame – it was on a visit at home – had approached me again. And he brought up the topic of United Surgical Partners, and said that he had been looking at it, and that the company looked cheap.

You know, I think I was really taken back by his comment. And at that point in time, it was very clear to me that my brother was looking at United Surgical Partners not for any other reason but as a potential investment.

Q And, what happened after Michael told you that USPI looks cheap?

A Um, I agreed with him. In fact, I had had a healthcare services report or a healthcare research report that included healthcare services in my bag, and I had seen that it was their top LBO pick.

So I gave my brother that research report, and I said that I learned that USPI was likely going to be acquired by a private equity firm.

Q And was that confidential information?

[446] **A** Yes, it was.

Q Was that material information?

A Yes, it was.

Q So, were you encouraging him?

A Um, I certainly was.

Q Any other confidential information you recall giving to your brother, Michael, at that time about USPI?

A Um, no, just that that – the way that I learned about it was that my colleague Dan Decelles was representing the private equity firm that was looking to acquire the company.

Q And, why did you give your brother a research report? What was the purpose of that?

A Um, the reason – excuse me. The reason that I gave him the research report was it was on my position, and I thought to myself that in the event that, you know, that it was a way for me to kind of

absolve myself of any guilt of confirming that a transaction was ongoing at Citigroup and a way that my brother could potentially get – a negative situation such as the one I find myself in right now ever arose, that he could have information that could back up that he had done his own research on it.

Q He would have something to point to?

A Yes.

Q As opposed to pointing to you as the source.

A Yes.

[447] **Q** So over what period of time did you provide Michael information about USPI and a possible USPI acquisition?

A From that September time frame my brother, you know, persistently and repeatedly called me. And again, I did everything I could to sort of deflect it.

And, when he would get me on the phone, I figured the only way to sort of get him off my back was just to say – not to take his call, and to tell him that my colleague, Dan Decelles, who was working on it was still busy. And by that, I was effectively telling him, "sit tight."

Q So "Dan is still busy" was code for "sit tight"?

A Yeah.

Q "Deal's still going on"?

A Yes, and I –

Q Just taking longer than originally planned?

A Yes. And I did that, really, from September all the way through the end of the year, through December.

Q And, what did you think your brother was going to do with that information?

A I expected he was going to likely trade on it.

Q And why did you disclose the confidential information about a possible USPI acquisition to your brother?

A Um, you know, I – I had gone through a gamut of things in my mind about the persistence and the nagging. And, I – I could see that my brother was going to be relentless, and I [448] was afraid of being detected. So I disclosed USPI to him as opposed to other companies that I was working on, to avoid detection. And I did it so I could help him.

Q And did you help yourself in that process, too?

A Standing here, sitting here today, I obviously didn't help myself. But I thought I could get him off my back. Yes.

Q The goal at that time –

A The goal at that time was to give me relief from him, and I felt that was the way to do it, was to give it to him. It would benefit him, and benefit me directly.

Q So you – you would disclose confidential information to your brother, Michael, about other companies, prior. How did the USPI situation differ from those earlier – confidential information that you provided?

A For me, again, naively, in looking back at it, I'm just so embarrassed with myself and my own conduct. And, should have known better. But, I didn't expect him to be trading on the information.

In the case of USPI, I – I fully expected that he was going to trade on that information. And it was when I gave him – when I finally gave him the information, it was my intent to benefit him. Before, I had no knowledge he was trading, I had no intention of him having any gains or – even at that time, I didn't know what he was – how he was going to benefit from it.

[449] But, just – USPI, I knowingly, willfully acted to benefit my brother.

Q The two of you had been watching a television show. Was it about USPI?

A It was about leveraged buyouts. And we were talking about people in my group, and private equity investors, and how much money they made. And the subject of Dan Quealy, who was the partner in that private equity firm, came up. And so the name USPI came out.

And he turned around and did his – you know, looked it up, and came back to me and said it was

cheap. You don't say that unless you're doing real work around a company.

Q But you proactively brought up the name USPI?

A Yes, I did.

Q I want to turn now to another company –

THE COURT: Let's take a break at this point.

MS. DOWLING: Yes.

THE COURT: Take another matter. We're going to need a 20-minute break this time, so get back at 3:15.

MS. DOWLING: Thank you, Your Honor.

THE COURT: Thank you.

THE CLERK: All rise for the jury.

(Jury excused)

(Recess from 2:54 to 3:19 p.m.)

(The following proceedings were held in the presence

* * *

[455] clear that it's us working for Schering Plough, I think it is important to initiate – for me to keep the meeting with Mark McDade, and initiate conversations on other topics than just that one assignment of Schering Plough potentially buying them.

Q And did you, in fact, keep that meeting with Mr. McDade?

A I did.

Q And you can put that exhibit to the side, too, please.

(Request complied with by the Witness)

Q Mr. Kara, in the early 2007 time period, did you – do you recall having any discussions with your brother Michael about a possible acquisition of PDL Biopharma?

A Yes.

Q And what was the nature of those discussions?

A You know, I was over at my brother's house around this February time period. And I think it was specifically around a usual visit, where I made it a point to try and stay at home and then visit my family.

And my brother saw that I was receiving faxes at his house, and also getting packages for presentation materials related to a meeting with Mark McDade. And he asked me, "Hey, you know, what " something to the effect of "You look busy."

And I said, "Yeah. Hopefully – you know, we're in the midst of a transaction with PDLI. The company, you know, may be – may be interested in selling. Let's see where it goes."

[456] **Q** And was that confidential information that you imparted to your brother?

A Yes.

Q Was it non-public information?

A Yes, it was.

Q And would that have been material information?

A Yes, it was.

Q I want to move forward now to the March, 2007 time period. A company called Biosite. Are you familiar with a company called Biosite?

A Yes.

Q And what is it?

A Biosite is a medical diagnostics company based in the United States.

Q And in 2007, was Citigroup performing any work related to Biosite?

A Yes.

Q What was Citigroup doing for Biosite?

A At the time, I didn't know who the buyer was, but I learned that Citigroup was representing a company that was interested in potentially purchasing Biosite.

Q Do you recall who the potential purchaser was?

A I later learned that it was Beckman Coulter.

Q And were you personally doing any work on that Biosite/Beckman Coulter deal?

* * *

[459] **Q** Mr. Kara, after learning of the impending acquisition of Biosite, did you discuss Biosite with your brother, Michael Kara?

A I did.

Q And when did that discussion take place?

A It took place that Thursday. March 22nd.

Q And where were you at the time?

A I was in a taxicab in New York.

Q And what happened, how did that – that conversation come about?

A Um, I had received an e-mail from one of the assistants in the office. And, contacting me to let me know that my brother Michael had called. I was on the way to go see a colleague of mine – Dan Decelles, in fact – who had just recently resigned from Citigroup, and meet him in Soho, which is part of New York, or a little – a little area in New York.

I picked up the phone, I called my brother back. And, he didn't sound well. He told me that he had been sick, and the reason he hadn't called me in a few

days was that he was really ill. He said that my mom wasn't feeling well. And, just sounded very down. He then said that he needed a favor.

And, I said, "Okay. What kind of favor?"

And he said, "I need some information."

And I said something to the effect of "If this is about money, I can give you money."

[460] And he said "No, it's not about money. I need information. I owe somebody." And then he said, "Please, I need this. Please, I need this."

I paused in the taxi. I think a bunch of things just started going through my head. And, my – my immediate reaction was I went through numerous transactions that I was working on, and I was panicking and wondering what my brother had gotten himself into.

And out of my mouth, I said, "I – I think a company called Biosite – I learned a company called Biosite may be acquired as early as next week."

Q And, why did you choose to give Michael information about Biosite when he asked you for information, as opposed to another company that you were working on?

A As I had mentioned, I think it was just such a sudden and unexpected situation that when I realized he needed this information, and he wouldn't agree that it was an issue about money, that I – I went through my head, and I said I can't – I didn't want to

tell him about the biotechnology transactions that I was working on.

And I ended up telling him about Biosite because I wanted to reduce the likelihood that by giving him insider information, which if we ever got caught – which we did – that it could ever be attributed back to me.

Q And after you gave him the information that there was an [461] impending acquisition of Biosite, what happened next?

A I was in the taxi. And it just happened so fast, it was – I told him I needed to call him back. I paid the taxi. I called my brother back. I was pacing up and down the street. And, I just remember it as clear as yesterday.

And I told him, "Please, what I just did was wrong. It was illegal. Do not act on this. And do not give this information to anyone. And if you do, I believe that the Securities and Exchange Commission" – "the SEC," I said – "is tracing – will trace this phone call." And that, "We will get into a lot of trouble."

Q And what did your brother say in response?

A He said "Don't worry."

Q And what did you think your brother was going to do with the information you had given him about Biosite?

A He was going to trade on it.

Q I would like to show you now what's been marked as Exhibit 372.

(Witness examines document)

A Yes.

Q Do you recognize that document?

A I do, ma'am. Sorry.

Q And what is it?

A This is a copy of my Cingular wireless telephone records for my phone number while I was in New York. My cellphone [462] number.

MS. DOWLING: Your Honor, offer Exhibit 372 into evidence.

MS. SHIFMAN: No objection, Your Honor.

THE COURT: All right, 372 is admitted.

(Trial Exhibit 372 received in evidence)

MS. DOWLING: If we could look at the first page, please.

(Document displayed)

BY MS. DOWLING:

Q Do you see the number listed here, Mr. Kara?

A Yes, I do.

Q Was that your cell phone number?

A Yes, it was.

Q If you could turn now to Page 34 in that exhibit. (Request complied with by the Witness)

A Yes, ma'am.

Q Do you see in the lower portion of this – if you could enlarge calls 161 through 170.

(Document displayed)

Q Mr. Kara, are you able to identify the phone calls you just testified to between you and your brother, Michael, where you disclosed the Biosite information?

A Yes, I am, ma'am.

Q And where are those?

[463] **A** In that far left column, they are Nos., Line No. 167 and 168. Those are the two phone calls that I just referenced.

Q And what times were these phone calls made?

A It looks like the first phone call was at 3:43 p.m. New York time. East Coast.

Q And who to what number was that call made?

A That was to my brother's cell phone, which was 707-567-2202.

Q And the second call?

A It was at 3:49. And it was also to 707-567-2202.

Q And how is it that you are able to remember this so clearly, Mr. Kara?

A This is – this has been a nightmare that I have relived every day of my life for the last six years. I wish I could take it all back. But I remember that conversation like it was yesterday.

Q Why did you choose to provide your brother with confidential information about Biosite?

A Terrible judgment, and it was an issue of panic. I didn't know what my brother was involved in, when I offered him money and he said it wasn't about money and he didn't need money. I didn't know what he had done. And, he said he needed information. And, that's what I gave him.

Q If you could set that exhibit to the side, please.

(Request complied with by the Witness)

* * *

[468] **A** I learned about it from my brother, initially. He called me on April 30th of 2007. And the reason that I can remember that date, it's my wife's birthday. And we had just come back home from dinner. And, my brother called. He sounded pretty shaken up.

And, he told me that he had received a call from the SEC, and that they had asked him about Biosite, Andrx and USPI. That he had told them that he did not get stock information about those companies from

me. That they had asked him whether or not we shared confidential material non-public information. He said no.

And then he also started to name other people that the SEC asked about. As soon as he started telling me the names of other people, I stopped him. I told him I didn't want to hear about it, any more. And I said something like, "What the F were you" – expletive – "were you thinking?"

Q And after the call with your brother, did the SEC contact you as well?

A Yes, they did.

Q And when, approximately, was that?

A The SEC called me the next day.

Q And what happened?

A I answered the phone. And, they began asking me questions about Biosite, USPI, Andrx and other companies. And, they also asked me about my relationship with these other [469] people. And I made numerous false statements to the SEC.

Q What are some examples of the false statements that you made to the SEC?

A They asked me whether or not I told my brother about a company called Biosite. I said no. That was false.

They asked if I had shared material non-public information with my brother about Citigroup clients. I said no. That was false.

I said – they asked me if I had told my brother about a company called USPI. I said no. That was false.

They asked me if I had shared information about Andrx Corporation with my brother. I said no. And that was false.

They also asked me if I had learned about a transaction related to Biosite. And I said "Not until after the deal was announced." That was false.

And I made numerous other false statements that I can go through with you and with the jury and with Judge Chen.

Q Mr. Kara, why did you lie to the SEC when they called you?

A Um, I was terrified. My wife was nine months pregnant with our first child. And, Grace was born on May 7th, so six days after that phone call. I was scared of the consequences on my family.

I didn't know what my brother had done with respect to the other people. Nor the involvement of others. I didn't [470] even know about the majority of the trading that they were asking me about. And, I was worried about my career and worried about going to jail.

Q And, after this call with the SEC, did you tell Mr. Bassam Salman that the SEC had contacted you?

A Yes, I did.

Q What did you tell him?

A Um, I told – it was around, you know, about a month after, or – that I had been contacted. So, a few weeks after. And I confided in Mister – with Bassam that I had received a call from the SEC, and that they had asked me about my involvement with insider trading, and they had asked me a bunch of questions about people that I didn't know about their involvement. And, that I was really worried about my career.

Q And what was Mr. Bassam Salman's reaction?

A He was concerned. He put his hands in his pocket and said, "Oh, my gosh, oh, my gosh," and began pacing back and forth.

Q Mr. Kara, were you aware that your brother Michael was providing the material non-public information that you provided him, to other people?

A No.

Q And were you aware that your brother was giving that information to Mr. Bassam Salman (Indicating)?

A No.

* * *

[483] **Q** A better job, if you wanted it.

A Yes, ma'am.

Q It's fair to say before what you did in this case, your career was on an upward trajectory.

A Yes.

Q You were a rising star.

A I had my ups and downs, but yeah, when I left Citigroup, ma'am, I was going to a very good opportunity.

Q Because you were on an upward trajectory (Indicating), a rising star.

A Thank you for saying that. I'll take the compliment.

Q Your reputation in your family was that you were a rising star.

A Yeah.

Q And you felt they were proud of you for everything you had done.

A Yep.

Q When you met Susie in 2002, she was a medical student at the University of Chicago?

A Uh, yes.

Q That's also a very prestigious medical school.

A She's an extremely brilliant woman.

Q And, she finished school and is now a pediatrician.

A Yes.

Q She's hard-working?

[484] **A** Extremely.

Q Beautiful?

A Yes.

Q Loving?

A Uh-huh.

Q You got engaged in June of 2003.

A Yes.

Q And you married in July of 2005.

A That's right.

Q You introduced your families to each other before you married, because that was important to you.

A Yes.

Q You wanted them to get a chance to get to know each other.

A That's – yes.

Q Build a connection, if that was possible, with each other.

A Yes.

Q That your families are connected is important, not just sort of for this cultural reason, but because it's important to you.

A Yes.

Q And it's important to your wife, Susie.

A Absolutely.

Q So, you had a chance to meet with Susie's family?

[485] **A** Yes, I did.

Q And, you had a chance to meet with Sam (Indicating)?

A Yes.

Q And Susie's family got to know you.

A Yes.

Q That was the purpose. You were the main purpose, since you were interested in Susie, potentially marrying Susie.

A Yes.

Q It was a serious relationship.

A Right away.

Q And, you wanted them to know what kind of man you are.

A Um, yes, I wanted them to understand who they could be considering allowing their sister to get married to.

Q You wanted them to know that you were hard-working?

A Yes.

Q That you were held in high regard?

A Uh, yeah, I think so.

Q That you were trustworthy.

A Yes.

Q It's fair to say that you wanted Susie's family to accept you.

A Absolutely.

Q And to accept your family.

A Yes.

Q You introduced your own brother, Mounir, Michael Kara, to [486] Susie's family.

A Yes, I did.

Q Do you call your brother "Michael," or "Mounir"?

A Um, I haven't spoken to him in four years, but I don't know what I would say – whatever you're comfortable with, I'm happy to call him.

Q When you spoke to him on a regular basis.

A Yeah, I call him "Mounir."

Q "Mounir." So I'm going to call him "Mounir" too, if that's all right with you.

A Okay.

Q Okay. You introduced Mounir to Susie's brothers. To Ghazy, the elder brother. Right?

A Yes.

Q And to Sam as well.

A Yes.

Q And, in your presence, Sam Salman and your brother Mounir had a chance to meet.

A Yes.

Q The first time they met was in May of 2002, when Sam accompanied Susie and a few other family members out here to California.

A That – that sounds about right.

Q And they lived in the Chicago area, so they flew out here to the Bay area.

[487] **A** Yes, ma'am.

Q And it was a quick visit. Two, two days, maybe two and a half days?

A I think that's right.

Q But the families, though you wanted them to really spend some time and get to know each other, they lived in different cities.

A Absolutely.

Q And Michael lived here in California (Indicating), Sam lived in Chicago. Is that correct?

A That's correct.

Q And they saw each other only occasionally.

A As far as I knew, yes.

Q And in fact, before your engagement, only that once in May of 2002.

A Um, I can't confirm it, ma'am. That could be very well true.

Q And usually, when –

A I'm just trying to think of the different times that – in between the engagement. I recall my mom and my dad coming out to Chicago as well on a separate, separate trip.

Q Okay. But right now, I'm just talking about Mounir.

A Yes, ma'am. Okay.

Q Okay? Usually when Mounir would be in the presence of Sam, you would also be present, in those early days.

* * *

[490] **Q** And, let's go back to that engagement party. Sam got to see your family – Mounir in particular is what I'm referring to right now – maybe one time during the year. Isn't that correct?

A It could be right, yes, ma'am.

Q Once in 2002?

A Um, that's the only visit that I – I personally recall Susie's family coming to, yes. And I don't recall my brother going to Chicago. I'm not sure.

Q Maybe once in 2003?

A I'm not – I don't know. I don't remember it.

Q Okay. And maybe once in 2004.

A Um, I think more than once in 2004. Because I recall the family coming out when my dad was ill, to check on my dad. And then, later at both the funeral services, which, I don't believe Sam was able to attend the funeral, but I do believe later was able to attend the memorial service.

Q And when parts of Susie – members of Susie's family came to visit your – your ill father, that was Ghazy and Susie. And Rose, Ghazy's mother. Was it not?

A Definitely I remember Tiger being there, yes. And Susie and her mom. I'm not – I am not sure if Sam came or not. And forgive me, ma'am, because I was living in New York, and was flying to see my dad

on weekends and taking red-eyes back on Sunday night to get back to work on Monday.

* * *

[495] **A** I sure did.

Q You breached your colleagues' trust.

A Yep.

Q And you breached your family's trust.

A Yes.

Q I want to ask you about your brother, Mounir. I know this is not easy. I know there's a long history.

In 1999, he was diagnosed with Bipolar I disorder. Is that correct?

A Um, I believe that's the right time, ma'am, yeah.

Q But he wasn't well long before that diagnosis.

A That's correct.

Q You have early memories of him being unwell.

A Yes.

Q He's ten, ten and a half years older than you?

A That's correct.

Q Your memories of him being unwell began when maybe you were like a preteen, 13 years old?

A Yeah, yes. I think any time from that – ten-year-old, eleven, twelve and beyond. Even – even eight or nine. Yeah.

Q Okay. So, Mounir was a late teenager, 20 years old, and you recall him having serious difficulties.

A Yes.

Q His illness manifested itself in many different ways.

A Yes.

[496] **Q** Sometimes, he would act paranoid?

A Um, it's tough to generalize about that, ma'am. There were times where he began to act paranoid. I didn't see that initially, in him. Again, I was young.

I felt the description of what you are describing, paranoid, sort of evolved when I was more in the late college time frame.

Q All right.

A So I was in my twenties, he was in his thirties.

Q So it progressed over time.

A Yes.

Q Got more severe.

A Yes.

Q More active. More present.

A I think more present, yeah.

Q Okay. More present. You – sometimes he had delusions?

A Um, you know, from what I had heard from other family members, yes.

Q And, those delusions also progressed and got worse over time.

A I think, as – from what I understood from his wife, because that's who I'd hear about the delusions from, they progressed as a result of many of the medications he was on.

MS. DOWLING: Your Honor, I object, on hearsay.

THE COURT: Sustained. I'm going to strike that [497] comment from the Record.

BY MS. SHIFMAN:

Q He's been suicidal?

A Yes.

Q Have you seen him in a delusion – when he's been in the midst of a delusion?

A No.

Q Has he talked to you about some delusional beliefs?

MS. DOWLING: Objection, Your Honor, hearsay.

THE COURT: Overruled.

THE WITNESS: Um, I'm thinking of the different incidents, ma'am, in my mind. The bugging incident, he never discussed it with me.

Right now, I can't recall specifically any events. If you have an event in mind, I would be happy to recall it.

BY MS. SHIFMAN:

Q We will get into some of the specifics in a bit.

A Okay.

Q It's fair to say he's been emotionally unstable?

A Yes.

Q He's acted impulsively?

A Yes.

Q He's had a tendency to exaggerate?

A Yes.

Q To sometimes even lie?

[498] **A** Yes.

Q You have described him to others as a pathological liar.

A I think we reached a point in our relationship where it was hard to believe anything that he was saying to me.

Q You even told the government that he was a liar, a thief, and a drug addict.

A Um, you know, I think those are some – I don't know how people interpret the things that I say or how they are written. I think those are pretty broad characterizations. But my brother certainly has had a lot of issues, yes.

Q And you wanted the government to know that in your mind, at the time you passed the information on to them, that he was a liar, a thief, and a drug addict?

MS. DOWLING: Objection, asked and answered.

THE COURT: Overruled. You can answer.

THE WITNESS: Um, if that's how it came across, I wanted them to know that much of what the government had originally thought about this case, I didn't know.

So, when I called him a liar, I was probably referring to the times where he just flat-out denied that he was trading, and he turned out to be trading. A thief, because I felt that much of the information that was used when I learned of the trading activities was taken from me, without my knowledge and without my consent.

And to call him a drug addict, I don't know if – I know

* * *

Volume 3
Pages 506-718

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. BASSAM YACOUB SALMAN, Defendant.	NO. CR 11-0625 EMC San Francisco, California Wednesday September 18, 2013 8:25 a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102
BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

[MAHER KARA – CROSS EXAMINATION/SHIFMAN]

[526] ask you some more questions.

A Okay.

Q And I wanted to pick up pretty much where we left off, which was talking about Mounir, your brother, and your relationship with him.

A Yes.

Q Okay? And you indicated that your brother is unwell at times.

A Um, there were periods in his life where, yes, he was unwell.

Q And when that's happened in his life, you've always tried to be there if he needed you.

A Yes.

Q And, during those periods in his life when he's been unwell, he's needed a lot of support from you.

A Yes, ma'am, but I do want to make it clear that much of the incidents that I – that – where my brother was unwell, oftentimes I was living away. And much of that was encumbered by my parents, and specifically by my dad.

Q Sure.

A Okay.

Q Especially early in your life, I would imagine.

A Yes.

Q But your brother's – following your father's death, your brother's been in regular and constant communication with you.

* * *

[544] **Q** It was one of his passions?

A Yes.

Q And, he cared very much about it?

A Yes.

Q And that's why the fact that even though it happened some time ago, that's why it still stayed with you all these years.

A Yes. There was a confrontation, and – and my dad was very upset about the coin collection. And that moment stayed with me in my – as an impression.

Q Right.

A I don't think I cared about the coins.

Q Sure. Now, you said that you knew that – you came to learn that Mounir used drugs.

A Yes.

Q And, one time you found cocaine in the pocket of his jacket (Indicating).

A Yes, I did.

Q And you con –

A I – excuse me. I don't know if it was cocaine.

Q You found a white powdery substance in his jacket pocket.

MS. DOWLING: Objection, foundation.

THE COURT: Overruled.

THE WITNESS: Yes, I did.

BY MS. SHIFMAN:

Q And you thought it was cocaine.

[545] **A** I didn't – I honestly, it was – I was in high school, and I didn't know what it even was.

Q You thought it was a drug.

A I thought it was something.

Q Okay.

A Yeah, that shouldn't have been there.

Q You confronted Mounir about it.

A Yes.

Q He lied to you about it and denied that those – that the powder was his. Right?

A I don't know if it was a lie. He told me it was for someone else.

Q At that time, Mounir would disappear for days.

A I'm sorry, I'm trying to think back to – at that time, you are referencing again, I was in high school when this happened. So I was in my teens – mid-teens.

I don't – I honestly don't remember, ma'am, that – that time period, if he was disappearing for days. I know that we – there were, you know, arguments between him and my parents about things. I don't know if it was disappearing for a few days or not.

Q Do you remember telling the government on April 21st – in April of 2010, that Mounir's drug binges increased in frequency after his wife became pregnant?

A Yes.

* * *

[550] **Q** That was a possibility?

A I don't know about the delusion, ma'am. It just –

Q That he might have gotten involved in some kind of criminal activity?

MS. DOWLING: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: I don't know that it was criminal, but that he got himself into a bad situation. I don't know if it would have been criminal. But, just a bad situation.

BY MS. SHIFMAN:

Q He didn't sound – he didn't sound stable at the time you were talking to him.

A He – he sounded very – faint and distant is the way I would describe his voice.

Q So, knowing what you know about Mounir, his history, his ups and downs, you still gave him information that you knew you weren't supposed to.

A Yes.

Q And, when you first started talking to Mounir about this information, you were talking to him as though he were a colleague or a consultant, maybe, to learn about biotech and drugs. Correct?

A I talked to him as a friend and a brother. And also as a, like you said, as – not a consultant, but as an industry expert. Somebody that I could use a sounding board to get [551] knowledge about the

sector, and in turn, was kidding myself into thinking that I was benefiting my clients by it.

Q And you described sort of a second phase of discussions with your brother, where you were talking about different drug treatment options that potentially might have been of benefit for your dad who was ill at the time.

A Yes, ma'am.

Q And you were talking about some drugs that might not have been available on the public market, that hadn't yet been approved by the FDA, the federal drug administration.

A That's correct. It's the Food and Drug Administration.

Q Sorry, Food and Drug. Thank you for clarifying that.

You know from possibly working in the healthcare group at Citi that it can take a long time – many months, sometimes years – to get approval by the FDA.

A Absolutely. Drug development can take up to 13, 13 to 15 years.

Q And, discussing with your brother about a new drug coming out doesn't necessarily make the drug available any quicker for use with your dad, does it?

A There are things kncwn as compassionate use, and that is what we explored specifically with Schering Plough in relation to Temodar, and my father was given Temodar as a prescription.

Q You did that. You ferreted that through with Schering Plough. Correct?

[552] **A** But it was something that I discussed also with my brother. I mean, we were – we were frantic, ma'am. We were looking for any hope that we could find for a terminally-ill dad.

Q Of course. Of course you were. But in discussing the drugs, you didn't just say, "There's a company I'm working with that might have effective treatment for my dad," did you? "For our dad," excuse me.

A Um –

Q Let me ask you a follow-up, just to put it together.

A Uh-huh.

Q You told your brother not only about the drug, but also about the company that had the drug. Correct?

A Sure.

Q Even though you could have talked about the drug without disclosing which company had it in development.

A I – I think I used the names of the companies to sort of legitimize the validity of the drugs. Schering Plough was a large, well-known pharmaceutical company with several marketed drugs.

And it wasn't like I was going to a very small biotech that had a young, young drug in development, and highly experimental.

Q But in doing so, in combining the name of the company with the drug, you were disclosing confidential information.

[553] **A** Yes.

Q When you could have just discussed the drug without disclosing the name of the company.

A You are absolutely right.

Q And when you would talk to Mounir and vent about your – your work day, you didn't just walk in to him and say, "Oh, my God, my day really sucked," did you?

A Um, I don't know. If you look –

Q Let me ask you, sir. You gave him specifics about how your day went wrong.

A Um, in some cases, yes, I very much – you know, my brother – I shared with him who the people were on my team, how – how we worked together, who are my friends, and things like that. So he got a very good understanding of what my healthcare team looked like, –

Q Sure.

A – and the type of work that I did.

Q So for instance, you could have said, "I'm going to be out of a big commission because they're treating me wrong in my company."

You didn't say it that way, did you, sir?

A No, I didn't, ma'am.

Q You combined it with the name of the company and a deal, a merger or an acquisition that was going to happen.

A Yes.

[554] **Q** And the same is true when you were going to go have dinner with the CEO. You didn't just say, "I'm going out to dinner for work," correct?

A That's correct.

Q You said, "I'm going out to have dinner with Mark McDade of PDL" – "of Protein Design Lab," or "PDL." And you talked about the company.

A Yeah. I think I was probably – yeah. I was probably wanting to brag to my brother that I was having dinner with a major – with the CEO of a major pharmaceutical company. I wanted him to be proud of me.

Q And you did that, and disclosed confidential information in that manner, instead of just talking generally about what was going on, even though you

knew that your brother wasn't always trustworthy or stable.

A Yeah. Yes.

Q And then, you testified earlier that you were surprised he was trading on the information you were giving him.

A I was.

Q I want to talk to you a little bit about – a little further about how Mounir relies upon you. He gave a toast, a speech at your wedding, did he not?

A Yes.

Q And, I saw – I saw all the pictures. There were a lot. Something like 700. Right?

[555] **A** I – you know, my wife, my wife hired a great studio company, so – yeah.

Q Yeah, yes. And, there was a video of the wedding as well. Correct?

A Yes.

Q So, I got to see the joy at the wedding.

A Uh-huh.

Q And you felt happy there?

A Very. It was the best day of my life.

Q And there were all your friends?

A Yeah, a lot of my colleagues, and friends and business school – business school friends. Actually, only one Citi colleague, but the rest were all business school friends.

Q Family?

A Yes.

Q Extended family?

A Yes.

Q Extended family of extended family?

A A lot on my wife's side. We were very tiny.

Q Okay. It was a very emotional moment for you?

A Yes.

Q And when Mounir, before dinner, gave a toast, holding the champagne, you and Susie, your wife, were up on a sort of raised dais, and people were looking at you, with the toast.

Right?

[556] **A** I believe so, yeah.

Q And Mounir was addressing the crowd of your family and friends?

A Yes.

Q The people in your communities that are closed to you.

A Yes.

Q That are close to your family.

A Yes.

Q And you recall when Mounir said to everybody that he speaks to you whenever he can find you.

A Yes.

Q You laughed. You laughed.

A Uh, yes.

Q And he said every day, if he can, he speaks to you.

A He would call me to tell me how he's doing. Yes.

Q He said that you were his mentor.

A I – um, I felt it the opposite way, too, in many ways. Yeah, okay, I don't remember his exact speech, ma'am, but okay.

Q When he said that you were his mentor, you started to cry.

A Uh-huh.

Q Do you recall that?

A Yes.

Q You were particularly emotional as Mounir was speaking.

A Yes.

[557] **Q** He told everybody at your wedding that he speaks to you, to seek advice from you on many things.

A Uh-huh.

Q Is that a "yes"?

A Uh, excuse me. Uh, yes.

Q Okay. You were weeping when he said that.

A I love my brother very much.

Q He said that you were his private counsel.

A I don't know what that meant, but, okay.

Q He said it.

A Okay.

Q He even joked that you were cheaper than his lawyers.

A I'm sure, as of today, that's probably right.

Q He said that you were one of the most generous human beings he knows.

A Um, we, as a family, like to see people happy. And –

Q Is that a "yes"?

A – we never had much, growing up. So, yes.

Q Okay. He told everyone in the crowd that you make very wise choices.

A I think he was talking about the bride.

Q He told everyone in the crowd that you make very wise choices, did he not?

A Um, I – I don't remember every single thing he said, ma'am, but if – if you saw it in the speech, then I'm sure he

* * *

[574] that your brother had traded heavily in the pharmacological industry.

A Um, that – I didn't know he was trading. I – I didn't know my brother was trading until I got a call from the SEC, telling me that he was trading. I expected he was trading, but I didn't – I had not discussed what my brother was doing with him.

Q All right. You get indicted in 2009.

A Uh-huh.

Q And there's still continuing discussions with the government. Correct?

A Yes.

Q Around December of 2009, your story was that Mounir was stealing information from you while you were here in the Bay area, having traveled from New York.

A I don't know if that was my story, ma'am, but that was – it was part of my belief of what had happened.

Q Okay.

A The totality of the case was much – the original indictment included several companies that I didn't have – that I wasn't intending to benefit my brother with.

Q Right.

A Okay. And that's how – I was not accepting responsibility initially, you are correct.

But, at the same time, I was trying to make certain that [575] – that people were aware that I didn't have knowledge of all of the trading activity that I was alleged to be involved in.

Q You believed that Mounir was actually going into your briefcase and sneaking a look at your documents.

A Yes.

Q These documents that related to various companies and potential merger or acquisition transactions?

A Yes, ma'am.

Q You wanted the government to know that you believed your brother was sneaky.

A Yes.

Q And deceptive.

A Yes.

Q And, that you believed that others had seen him going into your briefcase.

A Um, it's what I learned from others.

Q That – you believe that your mother and sister had seen him actually do this.

MS. DOWLING: Objection, hearsay.

THE COURT: Overruled. Goes to state of mind.

THE WITNESS: Yeah.

THE COURT: Let me explain that when I say "goes to state of mind," that I'm allowing this testimony to come in so that the jury can understand the state of mind of this witness, and not necessarily the truth of what was being said.

[576] **THE WITNESS:** Yes.

BY MS. SHIFMAN:

Q You believe that Mounir was eavesdropping on your telephone calls that you were having with colleagues or clients.

A Um, yes.

Q You told the government that.

A Yes.

Q And that you believe that others had – including your mother – had seen him doing that.

A Yes.

Q And your sister, too. You believe she had seen him doing that.

A Yes.

Q You told the government that you were trying to keep Mounir away from your professional life.

A I did.

Q You told them about how your key fob was missing. Do you remember that?

A Yes.

Q And a key fob is an encrypted device that attaches to the computer. Is that right?

A It doesn't attach to the computer, but it's an encrypted device used to log in to proprietary systems.

Q For instance, Citigroup's proprietary systems.

[577] **A** Yes.

Q And, you said it went missing, correct? The key fob?

A Yes, it – it did.

Q And it was later found at Mounir's house.

A Yes.

Q You've –

MS. SHIFMAN: If I could have one second, Your Honor?

THE COURT: Yep.

(Off-the-Record discussion between counsel)

MS. SHIFMAN: Thank you.

BY MS. SHIFMAN:

Q You've told the government, you wanted them to know that in Mounir's past, that he has been rambunctious and hard to control.

A I don't know if I used those words, ma'am, but, um, yes, my brother has been, um – he's been – he – he's conducted himself in the way that he wants to conduct himself.

Q All right. Your testimony has touched upon a company called Biosite. Right?

A Yes.

Q And you said that at the time in March of '07, Mounir called you seeking information about a company. Right?

A Yes.

Q And, you told us he sounded distant, he sounded faint, and it caused you concern.

[578] **A** Yes.

Q You were worried about him, and you thought he was in trouble. Right?

A Yes, ma'am.

Q And you told us that that's why you gave him information. Right?

A Yes, ma'am.

Q The second that came out of your mouth, you regretted it.

A Yes.

Q You called him back immediately. Right?

A I did.

Q You told him, "You should not use this."

A That's correct.

Q You implored him to not use the information.

A Yes.

Q You told him that it would ruin the family.

A And it has.

Q You told him, "Don't use it."

A Yes.

Q You asked him, "You're not going use this, correct?"

A Something to that effect, yes.

Q And he told you, "Don't worry about it."?

A That's correct.

Q You never intended for him to use that information.

A I did, when I gave it to him, I – I intended it. But I [579] tried to take it back and it was too late, ma'am. The damage was done.

Q Because you didn't want him to use it.

A I have – no. I didn't. I didn't want him to – I did initially, and it was a huge mistake.

Q You've testified as well about a company called Andrx. Right?

A Yes, ma'am.

Q At the time you were talking to your brother Mounir about it, you were not very happy with your colleagues at Citigroup.

A I was unhappy about that particular situation, about being removed from that account. It wasn't –

Q Right. You felt frustrated?

A Yes.

Q A little angry about being removed from the deal?

A Definitely.

Q It was going to cost you – excuse me, cost potentially $18 million in fees that would be credited to you?

A That's how I felt about it, yes, between the advisory and the financing fees, I was expecting somewhere up to 18 million for fees to Citigroup.

Q And that would have been important for your supervisors, in looking at – as to whether or not a promotion would be warranted.

A Yes, ma'am.

[580] **Q** You talked to your brother about this, to share your frustration about the job.

A Yes, and – and the company Wockhardt, I had already talked to him about it the previous year. And he was aware that I was working on a transaction, a previous transaction for six months prior, with Wockhardt.

So, again, I felt comfortable talking to him about a subject that – and he knew that I had gone to India and visited these companies, and developed relationships with.

Q Sure. I'm going to switch –

A I mean, I made some great – excuse me. Go ahead.

Q I'm going to switch topics.

A Okay.

Q You testified on direct examination, in response to a question from – from Ms. Dowling, that with respect to USPI, United Surgical Partners, that you gave your brother a report. A research report. Right?

A Yes, ma'am.

Q And, that research report was prepared for Citigroup clients, large clients, and other – other clients of Citigroup. Correct?

A Yes, ma'am.

Q It was not – that report, itself, was – withdrawn. You gave that report to him in case he ever got into trouble or was asked questions about USPI. Right?

* * *

[588] **Q** They're from a very prestigious global law firm, right?

A Yes, ma'am.

Q Rumor has it they're among the best securities lawyers in America?

A They're – they're terrific people. They're terrific human beings. And great lawyers.

Q And, terrific human beings. Sometimes those are not the same things.

And you met with them, you took their advice. But the decision about what to do is ultimately up to you. Right?

A Yes, ma'am.

Q All right. And you decided that it would be better for you if you had the chance, the hope, the possibility, to save yourself some prison time if you cooperated with the prosecutors by assisting them with their cases.

A Originally, ma'am, my cooperation I thought was going to be limited to say that I tipped my brother. And that is what I did. And that is what I've accepted responsibility for. I was unaware of the involvement of any other people, and what my brother had done with the information.

I have been brought into these matters to testify truthfully about the things that I have done, and in no way, shape or form, want to hurt anyone else. I really want to make that clear.

Q Okay. When – before you pled guilty, before you signed

* * *

[MAHER KARA –
REDIRECT EXAMINATION/DOWLING]

[595] **BY MS. DOWLING:**

Q And when you learned that, how did that make you feel?

MS. SHIFMAN: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: Upset. Shocked. Angry. Defeated. Manipulated. Betrayed.

BY MS. DOWLING:

Q Ms. Shifman asked you –

A And, responsible.

Q Ms. Shifman asked you about – had many questions about how you could have potentially avoided being here today. Is that right?

A Yes.

Q Do you have control over the actions of others involved in this investigation?

MS. SHIFMAN: Objection. That is not –

THE COURT: Sustained.

BY MS. DOWLING:

Q To your understanding, is this a larger investigation than just yourself?

MS. SHIFMAN: Objection, Your Honor. Vouching.

THE COURT: Overruled.

THE WITNESS: It is much bigger than just myself.

BY MS. DOWLING:

Q And more people than yourself and your brother benefited

* * *

[610] knowledge? What was that based in?

A My understanding is he has an undergraduate degree in biochemistry, and he did graduate work in toxicology. He had a very strong science background. Graduated from college, I believe, around the age of 20. So, he was very knowledgeable in science.

MS. DOWLING: Thank you Mr. Kara. Thank you, Your Honor. No further questions.

THE COURT: All right. Anything further on recross?

MS. SHIFMAN: No, Your Honor.

THE COURT: All right, thank you. Mr. Kara, you may step down.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: The Government's next witness.

MS. DOWLING: I'm sorry, Your Honor?

THE COURT: Next witness?

MS. DOWLING: Yes. The Government calls Mr. Paul Glyer.

MS. SHIFMAN: Your Honor, may I just approach to take down the binders?

THE COURT: Yes, uh-huh.

MS. SHIFMAN: Thank you.

PAUL HARTLEY GLYER,
PLAINTIFFS'S WITNESS, SWORN

THE CLERK: Please state your full name, spelling

* * *

[GLYER – DIRECT EXAMINATION/DOWLING]

[614] what were you relying on Citibank to do with Beckman Coulter with regard to the Biosite acquisition?

A We were relying on Citigroup to arrange the financing for the transaction. That was a pretty big check to be written, and so they needed to prepare analyses and the like to support financing that transaction, with a number of other financial institutions. But they – they would have been the lead in that arrangement.

Q And, how did you figure out – you said it was going to cost 1.5 billion. How did you figure out what price you wanted to – without getting too technical, what price you wanted to offer Biosite in order to buy them?

A Well, you know, pretty much like anyone, you want to buy something for as cheap as you can. But

the starting point in trying to decide what to buy a public company for is what the stock is trading for in the marketplace.

So we looked at what the stock price was, and we calculated what we thought the value of the business was. That was in excess of what the company was trading for in the marketplace.

So we felt that we could make a competitive proposal to the board of directors of Biosite to acquire the company for more than the company was currently trading for, and that that would – we hoped, would be attractive to them as the representatives of the shareholders of Biosite.

[615] **Q** And, does that all boil down to the stock price of Biosite?

A Yes.

Q So there's the current stock price, what it is trading for in the market, right? And then there was the stock price that you were going to offer in the bid?

A Correct.

Q And is there a difference between those two prices?

A Oh, yes. You always have to offer more than the current market price, to entice the board of directors to sell a company.

Q So during this time period, are you watching the Biosite stock price?

A Oh, many times during the day. You know, very concerned that news could get out potentially, and if that happened, then the stock price would rise, and then we may not be able to make a competitive proposal for the company.

Q Why is that?

A Well, if the stock price rises and we have to offer a premium on top of that, then the price might get to a point where there is no value left in the business for us to be able to obtain.

Q And you said you were watching that stock price daily to see if there was any news that was coming.

A Yes.

* * *

[AZAR – DIRECT EXAMINATION/DOWLING]

[627] **Q** And who is Maher Kara?

A Maher is Mounir's brother.

Q And, how do you know that he's Mounir's brother?

A Because I met him at – I met him several times with Mounir, and Mounir told me that, his brother.

Q And how many times did you meet Maher Kara?

A I say three times. One time at – we were having lunch at Mounir's house and he was there. Another time, I met him at their father's funeral.

And the third time, I did invite him to dinner at our house. Him and his wife, when they first get married.

Q And, why did you invite them to your house?

A It's basically a tradition between, you know, families, Lebanese families. If someone coming from abroad, or if someone gets married or something like that, you invite them to your house.

Q So, it is a cultural reason?

A Yes.

Q Okay. Is it because Mr. Kara –

A Because he was newly married. And then he came with his wife, yes.

Q And, prior to 2007, did you know what Maher Kara did for a living?

A Yes.

Q And what was that?

[628] **A** He was – he worked as an investment banker.

Q And how did you know that?

A Mounir told me.

Q And did you know what area he specialized in?

A He did mention something in the health care.

Q And do you know if Michael Kara was proud of his brother?

A Yes.

Q Did Michael Kara share any facts with you about his relationship with his brother?

A Well, I know they were – you know, they seemed to me like close family. They spent time together, based on what he said.

He also mentioned to me one time that, if I recall, that he helped his brother going to school, when he was going to college. Paid for his college.

Q And, do you know an individual named Bassam Salman?

A No.

Q And did you ever talk to anyone named Bassam Salman?

A No.

Q Did you know an individual name Karim Bayyouk?

A No.

Q Did you ever talk to anyone named Karim Bayyouk?

A No.

Q Mr. Azar, prior to 2004, how would you describe your level of experience with the stock market?

[629] **A** It's like a lot of people. I try to think that I know what I'm doing, and then you know, we invested in the market. I used to do, you know, investments, do some research, myself. Nothing sophisticated.

Q And what types of companies did you buy and sell in 2004?

A During that period, I basically did like tech companies.

Q Can you think of any offhand?

A Yeah. Like, we did Microsoft, Intel, ADI. You know, just – those companies that worked – you know, basically Cisco, you know, the companies that were like in the news, those days.

Q Ones people had heard of.

A Yes.

Q Okay. And, during that time period, how did you make your stock buying decisions with regard to Microsoft and Dell, and the others you mentioned?

A Well, it's like, you know, I did – obviously, listened to the news, did some reading. Read some magazines, go on the Internet. Research the stock. I'll see the volume of the stock, look at the PA ratio

(Phonetic), look at the price of the stock. You know, up and down through the year. Read some analysis, you know, like just individual research.

Q And, did you discuss the stock market in the 2004, prior-to-2004 time period with Michael Kara?

A Yes.

[630] **Q** And then after 2004, did the nature of those discussions change?

A Yes.

Q How so?

A It changed in, it started with a stock called APPX. One day I was told by Michael that – to buy the stock because the stock had a promising drug coming on the market. So I went ahead and bought the stock. And, there was some issues with the drug, so it didn't get an approval, so the stock went down.

And, you know, I kept on – on the dips I used to buy the stock; go up, I'd buy the stock; you know, just trading, myself, with it, to do some averaging. And I lost money on that deal.

And then after, you know, maybe more than a year or so, year and a half or so, one day he told me that, you know, "You gotta buy the stock again."

I said, "What's going on?"

He said, "Well, my brother's going down to meet with the owner of the company. And they're trying to sell the company."

So I went ahead and bought the stock. And, you know, the sale didn't go through. So I kept on trading the stock, and then sold the stock after a while.

Q Mr. Azar, I would like to show you now what's been marked

* * *

[635] (Document highlighted)

BY MS. DOWLING:

Q This looks like the trading activity from January, 2005. Is that correct?

A Yes.

Q Okay. We are going to highlight the transaction detail. (Document highlighted)

Q Do you see where the highlights are? We will enlarge it so we can actually all see it.

A Yes.

Q You see, there's Amylin Pharmaceuticals?

A Yes.

Q And it looks like there was a purchase on the 19th and the 24th.

A Yes.

Q Is that correct?

A Correct.

Q Okay. Why did you buy Amylin Pharmaceuticals in January, 2005?

A Because Mounir told me to buy it.

Q And why did he tell you to buy it?

A It's like a lot of these biotech companies, or healthcare companies that he mentioned to me. He asked me – he told me to buy them, either they had a drug coming on the market or they were going to – the company was going to be sold.

[636] **Q** And did he ever say how he knew that a company was going to be sold?

A Not – not about this, no. But about the other ones.

Q So there were times where he told you why he knew?

A Yes.

Q And sometimes where he didn't tell you why he knew?

A Yes.

Q And when he told you why he knew, what did he tell you?

A On the two occasions that I clearly remember that he told me, he told me that his brother told him that the company was going to be sold.

Q And was this significant to you, that the information had come from Maher Kara?

A Oh, yes. Yes.

Q Why is that?

A Because, I mean, I knew that he was working in the industry there, and he was in there, and he knew that the sale's going to happen. That's what he does. So, if the sale happens, then the stock price going to go up drastically, and there's going to be a profit made.

Q And were there particular types of companies that Michael would tell you about, that came from Mounir – came from Maher, excuse me?

A Yeah, I mean, that – there is a company called Biosite, and, obviously, APPX.

* * *

[640] **Q** What did Mr. Kara tell you about Celgene?

A He said, he said they are having a new drug on the market, or the company's going to be sold.

Q And when Mr. Kara gave you this advice to buy Celgene and some of these other biopharmaceutical companies, did you go and do independent research?

A What I did was basically, I went there myself, and I located them, you know, on my own stuff. And I looked at the computer, and looked at the research.

But basically, when it was coming from him, I went there and I bought them.

Q You went ahead and bought it.

A Yeah.

Q Why is that?

A Because I – I considered that the information is coming from, like, from an insider source, and it's – it has a lot of potential to be true.

Q Is it because even if he wasn't telling you with each occasion, you knew it was backed by Maher Kara?

A Well, what I did was through the years, I just put one and one together. So I figured that even though I was not asking him and he was not telling me, I figured that the information was coming from his brother.

Q So more likely, the biopharmaceuticals were going to be a sure thing?

[641] **MS. MOEEL:** Objection, Your Honor.

THE COURT: Hold on.

MS. MOEEL: Objection, leading.

THE COURT: Overruled.

(Reporter interruption)

BY MS. DOWLING:

Q So, more likely, these biopharmaceutical companies that Michael Kara was recommending to you were going to be a sure thing.

A Yes.

MS. MOEEL: Objection. Suggests the answer in that question.

THE COURT: I'm going to sustain that objection. That is too leading. The answer is stricken.

BY MS. DOWLING:

Q So, more likely, these biopharmaceutical recommendations?

MS. SHIFMAN: Same objection, Your Honor.

THE COURT: Sustained. Rephrase the question.

BY MS. DOWLING:

Q The biopharmaceutical companies, did Mr. Kara recommend to you various biopharmaceutical companies?

A Yes, he did.

Q And why did you jump on those investments?

A Because, because – basically I jumped on these investments because in my mind, these – these [642] recommendations, he was getting them from his brother. And, since he was getting them from his brother, there is potential of being true, and is going to happen, and we are going to make a profit on them.

Q And did you make profits?

A We did some, profit on some, and we lost money on others.

Q And, overall, profit?

A We made profit.

Q Are you familiar with a company called Andrx Corporation?

A Yes.

Q And what is Andrx?

A It is another biotech healthcare company, that Mounir had mentioned to me to buy.

Q And I want to turn to Page 143, please, of Exhibit 188. (Document displayed)

(Request complied with by the Witness)

A Okay.

Q If you could read the date at the top of this page.

A It's March 31st, 2006.

Q Okay. Now, we're going to go back, if we could, to the detail.

(Document displayed)

Q Mr. Kara (sic), had you heard of Andrx Corporation before Michael recommended it to you?

A No.

[643] **Q** What do you recall him telling you about Andrx Corporation?

A I recall, like, either he said that to buy it because they're going to have a drug, new drug on the market, or they're going to sell the company.

Q Okay. So I want to focus your attention now to the bottom of this page, the highlighted portion.

Does that reflect the Andrx that you purchased?

A Yes.

Q Okay. And now I want to talk about the time period of August, 2006.

Were you familiar with the company called United Surgical Partners International?

A I was not, before Mounir told me to buy it.

Q So that's how you learned about it, from –

A Yes.

Q – Michael Kara? If you could turn now, please, to Page 212 of Exhibit 188.

Let's look first at the date when you get there.

(Witness examines document)

A I don't see the date on the bottom.

Q It's on the screen, too, if it helps. For the larger view.

A Okay.

Q Is this a statement from August 31st, 2006?

[644] **A** Yes.

Q Now I want to go to the middle portion of the page. Okay. See where it says "United Surgical Partners"?

A Yes.

Q Before you purchased United Surgical Partners in this time period, were you familiar with the company?

A No.

Q Had you heard of it?

A No.

Q Was this another one of the biopharmaceutical companies that Michael Kara recommended to you?

A Yes.

Q And you believed that information was coming from Maher Kara?

A Yes.

Q Let's turn now to Page 227, please, of Exhibit 188. (Request complied with by the Witness)

(Document displayed)

Q Can you see that document? Maybe we can enlarge it a little bit.

A Yes, please.

Q First let's look at the date. What's the date? Appear to be September, 2006 time period?

A Yes.

Q Now, if we can –

[645] (Document displayed)

Q Thank you. Make it a little bigger, here. Okay.

So, Mr. Azar, does this reflect that you sold USPI securities some time in and around September of 2006?

A Yes.

Q Do you know, do you recall why you sold USPI securities in September of 2006?

A Well, it looks like what happened in here is basically I sold it for a loss. So, it looks like the information didn't become real, so, I took my loss and I went out of it.

Q So the information, it just – did you have an understanding of what had happened with the company, and –

A Yeah, I don't know, as I said before, I don't remember. It was a sale of the company or some kind of drug. So whatever – whatever I was told that is going to happen to that company didn't – didn't materialize. So I went – and I sold it.

Q And then did there come a time when you repurchased USPI?

A Yeah.

Q If we could turn now to Exhibit – I'm sorry, Page 256 of Exhibit 188.

(Document displayed)

Q Do you recall approximately when that was, Mr. Azar?

A No.

Q Let's look at this page (Indicating), and see if we can [646] refresh your recollection on that.

MS. DOWLING: If we can enlarge the whole portion, because he will need to see the securities down through "United Surgical Partners." And include the date, if you could, please. Which is up here (Indicating).

(Document displayed)

BY MS. DOWLING:

Q So, Mr. Azar, looking at this – looking at your statement here, does this help refresh your recollection as to when you repurchased the USPI securities?

A Yeah. I can see the date, yes.

Q I'm sorry?

A Yeah.

Q Yeah, so was it in this November 2006 time period?

A Uh-huh. Yes.

Q And do you recall why you repurchased USPI?

A No, not exactly why. I mean, I don't know if I purchased it because I've seen some movement in the – in the – in the stock, and went ahead and bought it. I just don't recall exactly why I went back.

Q Are you familiar with a company called Biosite?

A Yes.

Q And how are you familiar with Biosite?

MS. DOWLING: Thank you, Maryam.

THE WITNESS: Mounir told me to buy it.

[647] **BY MS. DOWLING:**

Q I want to show you – sorry. One more, sorry. I spoke too soon.

MS. DOWLING: On 188, can you pull 188 back up?

We're just going to go to Page 301.

(Document displayed)

BY MS. DOWLING:

Q Do you see the date of this monthly statement?

A Yes.

Q What is the date of it?

A It's March 31st, 2007

Q Okay.

MS. DOWLING: And, if we could enlarge that top portion, Maryam, please.

(Document displayed)

BY MS. DOWLING:

Q Does this reflect your Biosite activity?

A Yes.

Q And, why did you purchase Biosite?

A Okay. I was – I remember I was driving back from our Rocklin office. I used to go there once a

week. And, I got a call from Mounir, it was a late Thursday. I was in my car. And, he – he mentioned to me that, to buy Biosite.

And, I asked him, "Are you sure?"

And, before that, I recall that he made some [648] recommendations on some stuff that didn't happen, so I just asked him again. "Are you sure about it this time?"

And he said "Yeah."

And I said, "I mean, you are sure?"

And he said "Yeah, the man told me."

And I said, "Okay."

And then – he also said that the man told him that the company, the board of directors either approved the sale or they are going to approve the sale that day, and for me to buy it.

And then he mentioned that the stock might hit mid-eighties, after the sale. And I said, "Okay. You are sure about it?"

He said "Yes."

I said "Okay." So I went home. I went on my computer, I did some research about the stock. And I've seen some movement in the shares. And I – I did other things, and looking at, you know, where the stock is. And it was in the mid-fifties.

And, next day, I put an order, I bought the stocks.

Q And when Michael Kara told you that "the man" said, that the information came from "the man," who did you understand that to be?

A Uh-huh. His brother.

Q Any doubt in your mind?

[649] **A** No.

Q And you had never heard of Biosite prior to purchasing it?

A No.

Q And you bought it that night, after receiving that information? Or the next day?

A Next day.

(Off-the-Record discussion between counsel)

BY MS. DOWLING:

Q Did Mr. Kara give you any time frame to buy the stock? Did he tell you to do it right away?

A Yes.

Q So there was an urgency associated with the purchase?

A Yes.

Q And you complied, and followed that direction?

A Yes.

Q And, you made money off this purchase, right?

A Yes, we did.

Q How much money did you make on the Biosite trades?

A $108,000.

Q Overnight, virtually?

A Technically, yes.

Q So, I want to move forward into 2007 after the Biosite purchase. Are you familiar with a company called Alexion?

A Yes.

Q And what is Alexion?

* * *

[654] No further questions.

MR. REEVES: (Inaudible)

MS. DOWLING: Sorry, excuse me. Withdrawn. One moment.

(Off-the-Record discussion between counsel)

BY MS. DOWLING:

Q Just a couple more questions.

A Okay.

Q Mr. Azar, did you have any special training in securities regulations or insider trading?

A No.

Q And, when Michael gave you the information that you thought came from Maher, did that give you any advantage over other investors?

A Yes, it did.

Q And what advantage was that?

A Well, the advantage is I knew about it before it came out in the public. And usually when this thing has been, the stock – once the stock – once the information's in the public, the stock already is up. So you cannot make any profit on it when it's in the public.

So basically, it gave me the opportunity to buy it at the lower, at the price before it jumps up.

Q Did you think you were doing something wrong?

A Yes.

* * *

[MARDINI – DIRECT/REEVES]

[691] **A** That's my wife.

Q And how long have you been married to your wife?

A Since 1992.

Q All right. And next to her there is a name of a person, Safwan Hito. Who's that?

A That's May's brother.

Q Do you know Mr. Safwan Hito?

A Yes.

Q And in the diagram, do you recognize Michael Kara?

A Yes.

Q All right, good. And, just to rap out the diagram for the moment, there is a – a long box below you, all the way below you, with a person by the name of Mazen Mardini, all the way at the bottom?

A Yes.

Q Who is Mr. Mazen Mardini?

A My brother.

Q All right. And we will come back to Andre Coudsi in a minute.

You said you first got to know Mr. Mounir Kara in or around 1992, through the Hito family. Correct?

A Correct.

Q Thereafter, did you socialize with Michael Kara?

A Yes, we became friends, and we kept visiting each other. We had a lot in common, and we became very close friends.

* * *

[694] often as Michael Kara?

A Yes.

Q All right. Were you in a position to observe the relationship between Maher Kara and his older brother, Michael Kara?

A Yeah. Mounir was like a second father to Maher. He was very protective of him. He took care of it him. And, my understanding, that he paid for all of his education.

Q Okay. From what you could see, were the two brothers close?

A They were very close.

Q All right. So let's turn to the subject of the stock market. And, I'm not quite yet done with Exhibit 1, please.

Did you and Michael Kara ever have occasion to talk about the stock market?

A We do. All the time.

Q Okay. So, I now want to kind of zero in on the period of time around 2003 through 2007 A smaller time period. Is that clear to you?

A Uh-huh.

Q During that time period, did you talk with Mr. Kara about the stock market?

A Yes.

Q So, describe the regularity or frequency with which you would speak about the stock market with Michael Kara.

* * *

[698] **A** I do. He was at my house. And he told me USPI – excuse me.

Q Take your time.

A That – "USPI is about to be taken over by another company. I don't know the time frame for that, or the price target of the takeover. Therefore, I would recommend buying some leap options on the stock to be on the safe side."

Q What is a leap option?

A A leap option is an option that expires only in January.

Q Do you consider leap options to be a sophisticated type of security in any way?

A I did. We never talked about it before, and I was kind of surprised when he told me that, too.

Q Why were you surprised?

A Because it's the right trade to do for that.

Q Why would buying leap options as they relate to USPI in the summer of 2006, under circumstances Mr. Kara described to you, be the right decision to make?

What does that mean?

A If you don't know the time frame for the stock, you have the option of either buying the actual stock, which you're going to put a lot of money for it, or buy an option. Options expires every month.

So in – in order to be on the safe side, to own that right to the stock is to buy longer period of options. And [699] those are the leap options.

Q All right. And, did you indicate that you do not recall an occasion prior to this in which Mr. Kara had suggested buying leap options?

A Yeah. He never did, before.

Q So is that a further indication of his sophistication as it developed in this time, in your mind?

A Yes.

Q All right. So, now, when you had this discussion with Mr. Kara about USPI, did you consider this to be confidential information that you were getting, in any way?

A I wasn't really sure at that point, but I thought, you know, it's coming from him, and considering that his brother is an analyst, and his knowledge of the high-tech – of the healthcare business is

increasing by the – every time we get together, I thought that might be an – an opportunity.

Q Okay. And, did you know where his brother was working at that point in his career?

A I didn't.

Q Did you know what he was doing, what – what his occupation was?

A I did. I know he was an analyst in the health-care business.

Q Okay. On Wall Street?

A On Wall Street.

[700] **Q** All right. And, did that – was it – there's something about the relationship between Maher Kara and Michael Kara that gave you confidence in what Michael Kara was saying about USPI?

A Yes.

Q What was that?

A The fact that he is an investment banker made – made a difference.

Q All right. So, once you and Mr. Michael Kara had discussed USPI, what did you do next?

A I directed my friend, Andre Coudsi to buy some options, some leap options for me, which he did. And the leap option expired, so we bought another set.

And finally, the stock was taken over right around February of 2007.

Q Okay. How did you do on your trading in USPI options?

A The takeover target or the premium was very small. So, we ended up not making money on that trade.

Q All right. Why did you ask Mr. Andre Coudsi to execute your trades for you?

A I had an arrangement with Andre, for him to do my option trades. My wife does not like me to do option trades in our personal account.

Q Okay. Let me move forward, if I could, to in or around March, 2007.

* * *

[702] **A** Nick Soto.

Q Let's go back to your conversation with Michael Kara that led to the trades you have described.

A Uh-huh.

Q What did Mr. Kara tell you about the takeover of Biosite?

A That Beckman is ready to acquire Biosite, right around 85.

Q $85 a share?

A $85 a share. Takeover target. And that the – the time frame is very tight.

Q Now, when Michael Kara told you, did you have an understanding whether it was public knowledge, whether it was known to all the other investors investing in the stock market that Beckman Coulter would be buying Biosite at $85 a share?

A It wasn't public.

Q It was not public knowledge. Okay.

A No.

Q Was that valuable information to you, Mr. Mardini?

A It was valuable.

Q Why was it valuable?

A It was an information that I could benefit from it, and act on it. It – it's exclusive information.

Q That it would be not known to other investors in the market?

A That's correct.

Q Okay. That was what you thought.

[703] **A** Correct.

Q And, that brings us to what Michael Kara said about "Don't go crazy."

What, what did that mean to you, Mr. Mardini?

A It meant that he really does not want me to buy a lot of options.

And my understanding is, just when the stock is taken over, the size of the trade or the – the size of the profit would alert the SEC and track down the trade.

Q If you went crazy and bought too many options, it might draw attention.

A Correct.

Q Is that some of the inferences that were working in your mind?

A That's correct.

Q Then, Mr. Kara continued. He went on to say, "Don't go crazy because our buddy might get in trouble"?

A Correct.

Q What word did Mr. Michael Kara use for the word "buddy"?

A He – during the conversation, we were going back and forth between Arabic and English. And the exact word that he used was "*sahibna*," which means "our buddy."

Q All right, you're going to have to spell *sahibna*.

A S-A-H-I-B-N-A.

Q And in the operation of your own mind, who did "our [704] buddy," "our *sahibna*," mean to you, Mr. Mardini?

A Well, the only mutual person that we both know that would be hurt if I went crazy and was discovered was Maher, in my own mind.

Q So you thought he was conveying information that came from Maher?

A Yes.

Q Did that make that information valuable to you?

A Yes.

Q Did you need to hear very much more about Biosite in order to be very interested in buying those securities?

A That's all it take. The whole conversation did not take more than three to four minutes.

Q So, did you think you now, with that three-to-four minute conversation, have an important advantage on other investors?

A Yes.

Q Had you ever discussed Biosite with Mounir Kara before?

A Never.

Q Okay. Did he mention anything about Jim Cramer or Mad Money – withdrawn.

Do you know the show Mad Money, and Jim Cramer, on television?

A Yes, yes.

Q In recommending Biosite to you on or around March 22, 2007, did he ever suggest that the recommendation was coming

* * *

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Pages 719-1024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA,	)
Plaintiff,	) NO. CR 11-0625 EMC
vs.	) San Francisco, California
BASSAM YACOUB SALMAN,	) Friday
	) September 20, 2013
Defendant.	) 8:10 a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS
(SEALED PORTION OMITTED)

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

[768] [MARDINI – DIRECT/REEVES]

Mr. Mardini. And, good morning Mr. Mardini. And, you may proceed.

NASSER MARDINI, PLAINTIFF'S WITNESS, RECALLED

MR. REEVES: Thank you, Your Honor.

Good morning, Mr. Mardini.

THE WITNESS: Good morning.

THE REPORTER: Excuse me. I just want to remind you, you're still under oath.

THE WITNESS: Yes.

DIRECT EXAMINATION RESUMED

BY MR. REEVES:

Q Do you understand that, sir?

A Yes, I do.

Q All right. Well, good morning.

A Good morning.

Q When we left off on Wednesday afternoon, you were testifying about the tip that Michael Kara gave you with regard to Biosite, in or around March 22, 2007.

Do you recall that testimony?

A Yes.

Q And, in substance, you said that Michael Kara told you, and I'm paraphrasing your testimony as carefully as I can, that there would be a takeover of Biosite by Beckman Coulter. Is that correct?

A Correct.

[769] **Q** That there was not a lot of time for you to invest; that it would happen soon. Is that correct?

A Correct.

Q Michael Kara urged you not to go crazy, as he put it, in buying securities relating to Biosite. Is that correct?

A Correct.

Q And he emphasized that "You should not go crazy because if you did it might hurt our *sahibna*," or "our buddy."

A Correct.

Q And you understand the reference to "our *sahibna*" or "our buddy" to be a reference to Michael Kara's brother, Maher Kara, at Citigroup.

A Yes.

Q All right. Now, when you got this information from Michael Kara, do you consider this inside information?

A Yes.

Q Confidential information?

A Yes.

Q Non-public information?

A Yes.

Q Valuable information to you?

MS. MOEEL: Your Honor, at this point we are going to object to the repeating of the testimony.

THE COURT: Overruled.

[770] **BY MR. REEVES:**

Q Did you consider it valuable information?

A Yes.

Q Why was it valuable to you?

A The urgency of the call, the name of the company, the time frame and the strike price. And the fact that he already gave me a tip earlier, a year ago,

with the Surgical Partners, USPI, made it valuable to me.

Q And is another way of expressing this concept of value to say that it was material information to you, Mr. Mardini?

A Yes.

Q All right. So after you had this conversation with Mr. Michael Kara, what did you did next with regard to any possible trading in Biosite securities?

A I – the next morning, I directed my friend, Andre Coudsi, to buy some options.

And I bought some Biosite in one of my friend's account that I have Internet access to it. His name is Nick Soto. And I told my brother about the stock, too.

Q You told Mazen Mardini about it?

A Yes.

Q And you traded on behalf of your friend, Nick Soto?

A Correct.

Q And you also entered trades through your friend, Andre Coudsi, but for your own benefit.

* * *

[779] **Q** Okay. And why did you decide to try to mislead the SEC?

A Well, I thought there is enough reference in Jim Cramer's report to a takeover, that the – for some reason, dissuade the SEC from continuing the investigation.

Q So, did you think you could pull off the cover story in a sense?

A Yes.

Q Okay. But I guess my question is a – a more simple one. Why not tell the SEC the truth? Why didn't you tell them that you invested in Biosite based on a tip from Michael Kara?

A. Because I know the tip came from Maher, and I was trying to protect Maher, too.

Q Okay. Protect him from what?

A Since he's an investment banker, he cannot share confidential information with anybody. And, I know by sharing the information with Mounir, he made a big mistake. And I was trying to protect him.

Q Were you also trying to protect yourself?

A Of course.

Q Were you trying to protect yourself from the possibility that you might be prosecuted for insider trading, for example?

A Yes.

Q And that others with whom you had been speaking might also be prosecuted?

A Yes.

[780] **Q** Like Michael Kara?

A Yes.

Q Like Maher Kara.

A Right.

Q Let me move forward, if I can, still further, to late in the year 2007. Or about December 6, 2007, were you contacted by the FBI in this matter?

A Yes.

Q Do you remember that occasion?

A Yes. They came to my office. To my work.

Q Okay.

A And, they basically introduced themselves as they're investigating the criminal action of insider trading. And basically I referred them, I told them that I need to speak to my lawyer.

Q So at that time, did you make any substantive statement to the FBI?

A On that meeting, no.

Q No. You didn't answer – agree to answer their questions?

A Correct.

Q And, made no substantive statement.

A Correct.

Q And instead, you informed them that you wanted to get a lawyer?

A Correct.

* * *

[MICHAEL KARA –
DIRECT EXAMINATION/REEVES

[911] **A** San Francisco State University.

Q And in what year did you – withdrawn. Did you obtain a degree?

A Yes.

Q In what year, approximately?

A '80-'81.

Q And, what was your degree in?

A Biochemistry.

Q Thereafter, did you go to medical school for a few months?

A Yes.

Q And after school, what did you do for a living?

A I went to graduate school. And I studied toxicology.

Q And where did you go to graduate school?

A San Jose State University.

Q Did you obtain a degree from San Jose State?

A No. But I was admitted to the candidacy for a master's degree in toxicology.

Q And how long were you at San Jose State?

A Three years.

Q All right. And, after you completed your education, will you please describe your career.

A I started in the hazardous waste business. And I worked for a couple of companies. Between 19 – maybe '85 or so, until 1989 to 1990, maybe. And, I worked in toxic waste management, primarily. And chemical waste packaging.

[912] And after that, I went on my own. And I started my own firms. Two companies.

Q Approximately when did you start your own businesses?

A In 1992-1993.

Q And have you continued to operate your businesses since that time?

A Yes.

Q Is that how you make a living?

A Yes.

Q And describe the nature of the business that you run.

A One business was sold, Applied Chemical Disposal, in 1995 or so.

But there is still one consulting business, a corporation, Applied Remedial Services, Inc. And, it's a general consulting services company. And, we basically do hazardous waste cleanups. General consulting for soil and water, ground water remediation. And investigation.

Q Where are your businesses located?

A In Walnut Creek.

Q Here in the Bay area?

A Yes.

Q Now, at their largest, how large did the business that you start grow to?

A The company was about 13 employees. And it grossed maybe three or four million dollars a year.

* * *

[916] **Q** Did the FBI sometimes pay for your meals?

A Yes.

Q Now, over the course of your lifetime, Mr. Kara, have you had mental health – health symptoms?

A Yes, I have.

Q Would you please describe your mental health symptoms.

A I've had some difficulties. Um, in 1999, I was diagnosed with a bipolar disorder. And, maybe shortly thereafter, another diagnosis with post-traumatic stress disorder. Compounded by depression.

Q Okay. Thank you. In or around January of the year 2000, was there a period of time when you were involuntarily committed?

A Yes.

Q And at or around that time, did – were you referred to a doctor by the name of Dr. Woolery?

A Yes.

Q Are you still under his care today?

A Yes, I am.

Q So you have been under his care for a long – an extended period of time, is that right?

A About 14 years.

Q Was – was the opportunity to receive the care from Dr. Woolery important to you?

A It was a turning point in my life.

* * *

[918] **Q** How do you feel right now?

A Good.

Q Okay, good. Is there anything about your medications that would prevent you from testifying to the best of your ability today?

A No.

Q Are those the same medications that you have been taking for a while, during the period of time that you have run your business?

A They're the same medications that I have been taking for the last maybe six, seven years now.

Q All right. Good. Thank you very much. Do you know Maher Kara?

A Yes.

Q Who is Maher Kara?

A He's my younger brother.

Q Were you close to your brother, Maher?

A Very much.

Q Okay. And, over the course of your lifetime, in your own words, how would you describe your relationship with your brother, Maher?

A It was a very close relationship. More so, a relationship of a big brother to a younger brother.

More of a father-son type relationship. And, you know, we grew together.

And, it's very unfortunate that this case has occurred [919] because, you know, because of the attorneys involved, we can't talk to each other any more. So I've lost touch with him for a while.

Q So in the last few years, you have not been able to continue your relationship with Maher Kara? Is that your testimony?

A That is correct.

Q Okay. Well, we will focus on the period of time before 2007, going back in time. Is that clear?

A Yes.

Q How much older are you than your brother, Maher?

A Eleven or 12 years.

Q So who was the father figure, so to speak, to whom?

A I was.

Q And describe what you mean by you were the – you tried to be a father figure to Maher. What does that mean to you?

A I was the eldest in the family. Then there was my sister, who is about four or five years younger. And then there was Maher. Sort of like the baby in the house.

Q All right. Now, as – as Maher grew up, did you know what he did for a living?

A Excuse me. Yes.

Q And, once he completed his school, what did he do for a living?

A Maher became a banker. An investment banker. In New York [920] City.

Q All right. And did he have that career for a number of years?

A Yes.

Q Did you speak with him about his career?

A Yes.

Q All right. In any sense, before beginning his career, did you help him in any way with his education?

A Yes, I did.

Q How did you help Maher with his education?

A Maher went to University of Chicago business school. And, he needed some form of assistance for the MBA program.

Q Financial assistance?

A Yes.

Q Go on. What did you do?

A I had an additional $50,000, and I made sure that – gave him, you know, through my father. Because I didn't think he would take it directly, so I gave it to Dad, and Dad gave it to him.

Q All right. After he – after Maher finished his MBA, did you continue to do what you could to help him with his career?

A Yes. Yes.

Q And in what ways did you try to help Maher with his career? What did you do?

A Maher was in the high-technology group until 2003. And, [921] the high-technology group was recovering from the dot-com crash. And, the market had taken a turn for the worst. And he needed to get out of that group.

So, he came to me, and he asked me what would – what would be the best area to specialize in. And, I told him, healthcare would be the approach. And specifically, biotechnology.

Q Why did you recommend healthcare, and specifically, biotechnology?

A Because it's an area that I really understood, myself. And, I think the it was the most promising area for Maher.

Q What advantage, if any, did the fact that you understood biotech in the manner you have described, how would that have helped Maher?

A I – I was a trained biochemist, with advanced knowledge in toxicology. And, I could support Maher in the basic sciences. And at the same time, Maher had an MBA from a top-notch university.

So, I could assist him to assimilate in his new job by supporting him with information that he needed in case – in case he wanted to make that transition into the healthcare group.

Q Is that what happened?

A Yes.

Q And were there then discussions between you and your [922] brother, Maher, about biotech, generally?

A Yes.

Q Would you please describe those discussions.

A The discussions originated because of the ailment that my father had. My father was diagnosed in the beginning of 2004 with non-Hodgkins lymphoma, which developed into a serious brain tumor. And we started talking about basically all the companies that developed anti-cancer drugs, and how efficacious these cancer drugs could be to my father's problems.

And from there, the conversation transcended beyond that, into the different companies that manufactured anti-carcinogens. And from there, the conversation grew outside of the realm of my father's drugs into other companies that Maher was working on.

Q Okay. Let me follow up a little bit on your answer.

Did Maher make the transition to the healthcare group, and to biotech companies in particular, in or around the year 2003?

A Yes.

Q And at that time, did you have discussions that you recall with him about some of the science associated with biotech companies?

A Yes.

Q And was it your intention to help him by teaching him, in [923] a sense, about that science?

A As much as I could.

Q All right. And did your discussions with him then progress to discussions of the actual companies that sold particular biotech products and drugs?

A (Nods head)

THE COURT: Speak –

THE WITNESS: Forgive me. Yes. Yes.

BY MR. REEVES:

Q All right, good. All right.

And so in that way, in that time period, in or around 2003, did the discussions you are describing extend into public companies in the healthcare sector, and the drugs and products that they made?

A Yes.

Q And the performance of those companies?

A Yes.

Q All right. So, I will come to your father's illness in a minute. But I want to ask you if in or around the same time period, getting into 2004 but now extending to in or around 2007, did you, yourself, Mr. Kara, trade in the stock market?

A Yes.

Q Okay. How would you describe yourself is as a – as an investor in the stock market during that time period?

A I was – I was an active trader in the options market.

[924] **Q** What does that mean to you, to say you are an active trader in the options market?

A I traded almost on a daily basis, in – in options.

Q Now, describe the sorts of things that you would need to focus on in order to trade daily in options in the stock market. How time-consuming or difficult was that for you?

A You know, dealing in options is not a simple thing. It really isn't. You have to know many parameters.

And, at the same time, it's such a volatile atmosphere that you need to be very quick, and you need to know certain models, and you need to understand the fundamentals of certain issues. And, you need to have a little bit of money set aside for that. And, you need to have a little bit of a gambler's mentality. Because you could lose everything that you have, in a split-second.

So, if you have all of those combinations, then you're ready for the options market.

Q Okay.

A And then – (Nods head)

Q Now, did you use any trading software to assist you in your trading in the options market in or around 2004 to 2007?

A I had to. I used training software put out by Charles Schwab, called Street Smart Pro.

Q What is Street Smart Pro?

A Street Smart Pro is an active trading software made out

* * *

[926] **Q** And in that period of time, or in or around 2003, did you come to know a person by the name of Bassam Salman?

A Yes.

Q And how did you know Mr. Bassam Salman?

A Sam Salman is the younger brother of Susie.

Q All right. And, did you – what was the circumstance under which you got to know Mr. Bassam Salman? Was it during the meetings of the families that you have described?

A Yes.

Q Okay. Describe how you came to know him during this time period, in that process, please.

A I – you know, we are almost the same age. And, we took a liking to each other. And we shared some business ideas.

And, we sort of clicked from the beginning.

Q You what?

A We clicked from the beginning.

Q You clicked from the beginning. All right. Did you become friends with him, in a sense?

A Absolutely.

Q All right. Did you have an opportunity in this time period, at or around the time Maher and Susie are considering getting married, to discuss your brother Maher directly with Mr. Bassam Salman?

A Of course.

Q And, what sort of things would you and Bassam Salman [927] discuss with regard to Maher?

A We discussed basically, you know, what Maher did, what's his position, what his life is like, where he's going to live, where Susie is going to live. And, basically, you know, the kind of person that Maher is. And just, some general information about Maher. Their future brother-in-law.

Q What discussions do you recall with regard to Mr. Salman about what Maher Kara did?

A Specifically, you know, I – I told him that Maher was a banker with Citigroup.

Q All right. Go on.

A That he works in New York. And more so, that he works hundred-hour weeks, and that I'll help them, you know, initially. And that they'll probably end up living in New York. And, you know, Susie will enjoy New York, and that sort of thing.

And basically, I gave him an idea of what a banker's life would be like.

Q Well, what is a banker's life like? What do you mean by that?

A A very difficult life, you know, very stressful life.

Q Because of the work hours?

A Yes.

Q Okay. And what was his reaction to that?

A He was very understanding.

* * *

[935] Abraxane, manufactured by American Pharmaceuticals, also known as APPX?

A Yes.

Q Describe the detail, if you would, about what it is you and Maher are talking about in 2004 about Abraxane and APPX.

A We would discuss basically the potential for Abraxane to be utilized by the physician, by the oncologist that is treating my father, to use Abraxane on my dad for the tumor. And whether we can get him a permission from the FDA to use Abraxane.

At the same time, we would discuss APPX, the manufacturer of Abraxane, and then the conversation would transcend into the profit-and-loss statement of APPX, the options charts at APPX, and how much money was APPX worth.

And it was a one-drug company, and it would be an acquired – who would acquire APPX. And, how to make money on APPX. It would be a target takeover, et cetera.

Q So, is it fair to say, in any sense, that the conversations over time with Maher Kara evolved from the – the pharmacology, if that's the correct word, associated with Abraxane into the performance and specific stock performance of APPX?

A Yes.

Q All right. I would like to show you what has been marked as Government Exhibit 100.

[936] **MR. REEVES:** If I may approach, please?

THE COURT: Yes.

BY MR. REEVES:

Q Do you recognize Exhibit 100?

A Yes.

Q What is Exhibit 100?

A Exhibit 100 is a fax – forgive me, an e-mail.

Q Are you one of the recipients of the e-mail?

A Yes.

Q Are you the author of the e-mail?

A Yes.

Q And who is the other recipient of the e-mail?

A Maher.

Q So this is an e-mail from you to your brother, Maher?

A Yes.

Q On or about what date?

A June 3rd, 2004.

Q Now, in this e-mail, do you – are you discussing APPX?

A Yes.

MR. REEVES: At this time I offer Exhibit 100 in evidence.

MS. SHIFMAN: Hearsay, Your Honor.

THE COURT: Overruled. 100 is admitted.

(Trial Exhibit 100 received in evidence)

(Document displayed)

[937] **MR. REEVES:** If we could enlarge the top part. And if we could highlight, please, the portion of the text that reads " Janine's dress "

(Document highlighted)

MR. REEVES: Good. And if you could also highlight, please, the e-mail address for Maher Kara. Thank you.

(Document highlighted)

BY MR. REEVES:

Q So, Mr. Kara, you write to your brother on June 3rd, 2004, the following e-mail. Would you please read it?

A (As read)

"Maher, I understand habibi. When yu have a chance & call me back please remember that I need Janine's dress size from yu. Luv yu, your brother, MK."

Q Now, there's a reference to "Janine's dress size." What is that a reference to?

A APPX's acquisition price.

Q Why are you using the words "Janine's dress size" for APPX's – I think you said "acquisition size," if I heard you correctly?

A "Acquisition price."

Q "Acquisition price." Why do you use the word "Janine's dress" to talk about APPX?

A Um, Citigroup monitors traffic on the e-mail system. So, if I put down "APPX acquisition price," I don't think they [938] would look at this very kindly.

Q Was "Janine's dress" a code word for APPX?

A Yes.

Q And why were you speaking with your brother about the performance of APPX in this manner in this time period, Mr. Kara?

A I was trying to get APPX's potential acquisition price from him.

Q In this time period, did you have an understanding as to whether Maher Kara had access to that kind of information?

A Yes.

Q What was that understanding?

A That he had access to this kind of information.

Q How would he have that access?

A By – because of his position at Citigroup.

Q Did you know if there was any relationship between Citigroup and APPX in this period?

A Yes.

Q What was your understanding of what that relationship might have been?

A Citigroup was representing APPX.

Q All right. Were you seeking information that may have been confidential at this time period?

A Yes.

Q For what purpose?

[939] **A** For profit.

Q To trade on it?

A Yes.

Q All right. Did you have a series of e-mails with your brother, in which you are talking in this type of code?

A Yes.

Q Where you are using the term "Janine's dress" for APPX?

A Yes.

Q In order to convey information that you didn't want Citigroup to know you were talking about?

A Yes.

Q All right. I would like to show you what has been marked as Government Exhibit 99.

MR. REEVES: If I may approach, please?

THE COURT: Yes.

(Witness examines document)

BY MR. REEVES:

Q Do you recognize that document?

A Yes.

Q What do you recognize it to be?

A It's a similar e-mail, except this time it is from Maher to me.

Q All right. Is this an e-mail between you and Maher Kara, on or around June 3rd, 2004, where

you're using the "Janine's dress" code word for a discussion about APPX?

[940] **A** Correct.

MR. REEVES: At this time I offer Exhibit 99 in evidence.

MS. SHIFMAN: Same objection.

THE COURT: All right. 99 is admitted, objection is overruled.

(Trial Exhibit 99 received in evidence)

(Document displayed)

MR. REEVES: And if we could enlarge the top e-mail, please.

(Document displayed)

MR. REEVES: And if we could highlight at the extreme lower right-hand corner of the sentence that begins, "I will let you know . " et cetera, until the end of the sentence.

(Document highlighted)

MR. REEVES: That's great. Thank you very much.

BY MR. REEVES:

Q So, Mr. Kara, would you please read the highlighted portion of your brother's response to your e-mail on or around June 3, 2004.

A (As read)

"I will let you know about Janine's outfit as soon as possible."

Q What was your understanding about what Maher Kara was communicating in this e-mail to you?

[941] **A** He will let me know what the acquisition price will be.

Q For what company?

A APPX.

Q Thank you. Let me show you what has been marked as Government Exhibit 101.

MR. REEVES: If I may, please?

THE COURT: All right.

(Witness examines document)

BY MR. REEVES:

Q Do you recognize Exhibit 101?

A Yes.

Q What is this?

A This is an e-mail from me to him. From me to Maher.

Q Is this another e-mail between you and Maher on or around June 3rd, 2004, about Janine's dress size, also known as APPX?

A Yes.

MR. REEVES: At this time, I offer Exhibit 101 into evidence.

MS. SHIFMAN: Continuing objection.

THE COURT: All right, overruled, admitted.

(Trial Exhibit 101 received in evidence)

(Document displayed)

MR. REEVES: If we could enlarge that, and highlight the subject line, please.

(Document highlighted)

[942] **BY MR. REEVES:**

Q And would you read your e-mail to your brother, June 3rd, 2004, at or around 5:49 p.m., Mr. Kara, please.

A (As read)

> "Understand habibi, I did not mean to bother yu, please remember her size, although she is nine she weighs 73 pounds. Can yu believe it No more Cadbury or Godiva Chocolate for this baby."

Q Were you joking with him?

A Yes.

Q All right. Let me show you what has been marked as Government Exhibit 102 for identification.

MR. REEVES: If I may approach, please?

(Witness examines document)

THE WITNESS: Yes.

BY MR. REEVES:

Q Do you recognize this document?

A Yes.

Q What do you recognize it to be?

A An e-mail back from Maher to me.

Q In response to the last e-mail?

A Yes.

MR. REEVES: At this time I offer Exhibit 102 into evidence.

MS. SHIFMAN: Continuing objection.

[943] **THE COURT:** Okay. Overruled, admitted.

(Trial Exhibit 102 received in evidence)

(Document displayed)

BY MR. REEVES:

Q If you could read Maher's response to you, Mr. Kara, please.

A (As read):

"You are hilarious. You don't bug me, its just hard to figure it out continuously. Maher F.

Kara, Healthcare Investment Banking, Global Markets."

Q What was your understanding of what your brother Maher was saying when he said "It's hard to figure it out continuously"?

A It's a fluid situation that develops over time. And that he doesn't have a lock yet on the price.

Q Of APPX?

A Yes.

Q Not Janine's dress size.

A No.

Q I would like to show you Exhibit 103 for identification.

MR. REEVES: If I may approach, please?

THE COURT: Yes.

(Witness examines document)

BY MR. REEVES:

Q Is this another e-mail on this same subject in or around this same time period?

[944] **A** Yes.

Q Between you and your brother Maher, on or around June 4, 2004?

A Yes.

MR. REEVES: At this time, I offer Exhibit 103 into evidence.

MS. SHIFMAN: Continuing objection.

THE COURT: All right, overruled, and admitted. (Trial Exhibit 103 received in evidence)

BY MR. REEVES:

Q I'll let you summarize this.

This is a further discussion in which "Janine's dress" is used as a code for APPX? Is that correct, Mr. Kara?

A Um –

(Witness examines document)

MR. REEVES: If we could put it on the screen, please?

(Document displayed)

THE WITNESS: Yeah. Yes.

MR. REEVES: And if you could highlight the second line in the middle, the word "Janine," please. The second paragraph, second line right, in the middle. That's great.

(Document highlighted)

MR. REEVES: Okay, good.

[945] **BY MR. REEVES:**

Q Can you read the highlighted portion of your e-mail, please, Mr. Kara?

A (As read)

"Janine has a half day at school and me and Dad will pick her up."

Q Okay. What are you conveying there?

A That's what it is. I don't think there's any hidden message there.

MS. SHIFMAN: I'm sorry, Your Honor; I can't hear.

THE COURT: Okay. Could you say it a little louder, into the microphone?

THE WITNESS: Sure, Your Honor. Janine has a half day at school and Dad will pick her up. (sic)

BY MR. REEVES:

Q Okay. Thank you very much.

A You're welcome.

Q I would like to show you Exhibit 102, please. 104. 104.

MR. REEVES: If I may approach, please?

THE COURT: Yes.

BY MR. REEVES:

Q Do you recognize Exhibit 104?

A Yes.

Q What is this?

A It's an e-mail from me to Maher.

[946] **Q** Who was Janine? Was she a relative?

A My daughter.

Q Okay. Did she have a website?

A No.

Q Okay. Good. Do you recognize Exhibit 104?

(Witness examines document)

A Yes. Yes.

Q Okay. And what is it?

A It is an e-mail from me to Maher.

Q Is this another one of the e-mails that is discussing APPX, using the code word "Janine" or –

A Yes.

MS. SHIFMAN: Objection, Your Honor. He is leading him.

THE COURT: All right. Rephrase the question.

BY MR. REEVES:

Q Is there a discussion about Janine's dress in this e-mail? Or Janine, in this e-mail?

(Witness examines document)

Q And let me direct your attention to the second paragraph.

(Witness examines document)

A Yes.

Q Okay.

MR. REEVES: At this time I offer Exhibit 104 in evidence.

[947] **MS. SHIFMAN:** Objection, Your Honor.

THE COURT: All right. Overruled. And admitted.

(Trial Exhibit 104 received in evidence)

BY MR. REEVES:

Q Is this another e-mail between you and your brother, discussing the same subjects as some of the other e-mails?

(Document displayed)

A Yes.

Q All right. I have three more. Let me show you what has been marked as Government Exhibit 105 for identification. Do you recognize this exhibit?

(Witness examines document)

A Yes. This is an e-mail from Maher to me.

Q Again, on the same subject?

A Yes.

MR. REEVES: At this time, I offer Exhibit 105 in evidence.

MS. SHIFMAN: Continuing objection.

THE COURT: Overruled, and admitted.

(Trial Exhibit 105 received in evidence)

(Document displayed)

MR. REEVES: If you could enlarge the whole e-mail, that's great. And then highlight the portion, the last sentence of the top e-mail, please. Starting with "Moni."

(Document highlighted)

[948] **BY MR. REEVES:**

Q So, help us understand this e-mail dialogue, Mr. Kara. You write to your brother in the lowest e-mail, at the bottom. What do you write?

A (As read)

"Moni, I don't have any updates on Janine – nothing to share yet and as soon as she tells me about the outfit, I will let you know."

Q I'm sorry; I wasn't clear in my question. My question started with the lower e-mail that's not yet highlighted, from you to your brother, on June 5th, at 20:51:51.

Do you see that?

A Yes.

Q What do you write?

A "911MK."

Q What does that mean?

A "911MK" is – that is an immediate phone call back.

Q Was that a – what's – withdrawn.

The reference to "911." What does that mean?

A That is an immediate phone call back.

Q Is that a reference to the emergency phone line for people to use if there is an emergency?

A Yeah.

Q Was this a signal that you and your brother had worked out in this time period?

[949] **A** Yes.

Q Did it relate in any way to the care of your father, and his circumstances?

A Yes.

Q All right. And when you sent "911MK" to your brother, Maher –

A Yeah.

Q – what was your expectation that he would do?

A Call back immediately.

Q Because of some circumstance that may be associated with your father's illness?

A Correct.

Q All right. So, then, if we could now look at Maher Kara's response, what – if you could just read the first two lines, please.

At the top of the e-mail, not the part that's highlighted yet, but what does Maher Kara respond to you in the first two sentences, please?

A (As read)

"I tried your cell several times, it just goes to Vmail. Please do not send out the 911 messages unless they are for dad."

Q All right. Was this an instance where you were sending out a 911 message that was not for your father?

A Correct.

[950] **Q** What did you want your brother to respond so quickly to you about?

A There must have been an activity on the market.

Q Were you focused on APPX?

A Yes.

Q All right. Now would you please read the highlighted part of Maher Kara's response to you, on or around June 6, 2004.

A (As read)

"Moni, I don't have any updates on Janine – nothing to share yet and as soon as she tells me about the outfit, I will let you know."

Q Was that code, in any way?

A Yes.

Q What is the code for?

A Code for he's getting the information from a fellow banker, and as soon as he gets this information, he will let me know.

Q All right. Let me show what you has been marked as Government 106, please.

(Witness examines document)

Q Do you recognize this document?

A Yes.

Q What do you recognize it to be?

A An e-mail from Maher to me.

Q In or around June 11, 2004?

[951] **A** Yes.

Q Is it about the same subjects?

(Witness examines document)

Q Directing your attention to first e-mail at the top, if that helps.

A Yes.

MR. REEVES: Okay. At this time I offer Exhibit 104 (sic) into evidence.

MS. SHIFMAN: Continuing objection.

THE COURT: Overruled and admitted.

THE CLERK: You mean 106?

MR. REEVES: 106, please.

(Trial Exhibit 106 received in evidence)

(Document displayed)

MR. REEVES: And if we could enlarge, as much as possible, the whole thing. All the way down. Great.

And highlight at the very bottom, the second to last line that reads " please look at a dress for

Janine . . " and then the answer on the top e-mail that begins in the second sentence, "Will do "

(Document highlighted)

MR. REEVES: Perfect. Thank you so much.

BY MR. REEVES:

Q All right, Mr. Kara, would you please read the highlighted portion of your e-mail on the bottom, to your brother, on or [952] about June 10th, 2004.

A (As read)

"Please look for a dress for Janine. Your help is much appreciated."

Q And what do you mean by that?

(Witness examines document)

A Again – looking at APPX.

Q It is about APPX?

A Yes.

Q You are looking for more information?

A Yes.

Q And what does your brother respond in the e-mail above, in the highlighted portion?

A (As read):

"Will do on the Janine front."

Q Okay. So is he working with you, and trying to give you the information you're asking for?

A Yes.

Q All right. Last e-mail on this subject. Let me show you Exhibit 107, please.

MR. REEVES: If I may approach?

THE COURT: Yes.

(Witness examines document)

BY MR. REEVES:

Q Do you recognize Exhibit 107?

[953] **A** Yes.

Q What do you recognize it to be?

A It is an e-mail from me to Maher.

Q On or around July 21, 2004. Is that correct?

A Yes.

Q And is this about the same subject, Janine's dress?

MS. SHIFMAN: Objection, leading.

THE WITNESS: Yes.

THE COURT: Overruled.

MR. REEVES: At this time, I offer Exhibit 107 into evidence.

MS. SHIFMAN: Continuing objection.

THE COURT: Overruled, and admitted.

(Trial Exhibit 107 received in evidence)

(Document displayed)

MR. REEVES: If we could enlarge it?

BY MR. REEVES:

Q And Mr. Kara, if you would be kind enough to please read what you write to your brother Maher, on July 21, 2004.

A (As read):

"Hi Maher, I'm so sorry to bother yu again. I forgot to tell yu that the last call for Janine's dress is tomorrow morning. Luv yu, MK."

Q What did you mean by "the last call for Janine's dress is tomorrow morning?"

[954] **A** "The expiration for the calls is happening tomorrow morning. You better act."

Q And, was that – withdrawn.

Did that create a sort of investment circumstance that created urgency for you?

A Yes.

Q And, would you describe what that urgency was? What do you mean?

A The calls are expiring tomorrow morning.

Q And so, you needed to know what?

A We needed to know if there's going to be an acquisition or not.

Q Otherwise, what would happen?

A The calls would expire, worthless.

Q Expire, worthless (Indicating). And what does that mean?

A We lose the premiums.

Q Lose all your money?

A Yes.

Q All right. Okay. Let me show you another e-mail in this time period, on a different subject, I think.

If I could show you Exhibit 222, for identification.

MR. REEVES: Can I approach, please?

THE COURT: Yes.

(Witness examines document)

* * *

[957] **A** Um, Maher has a relationship with Remi Barbier, who is the CEO of Pain Therapeutics. So I was always on the lookout for these companies that he had a very close relationship with.

Any time I picked up any information on that, in his busy schedule, he doesn't have time for this. I have sent him information on them.

Q To help him?

A Yes.

Q All right, good. Thank you. I'm done with that.

MR. REEVES: Your Honor, what schedule would the Court like to follow this afternoon?

THE COURT: Well, we probably should go another 20, 25 minutes, then take a break. Or maybe another 20 minutes, 15, 20 minutes, and take a break.

MR. REEVES: Sounds good. Thank you very much.

BY MR. REEVES:

Q Mr. Kara, I would like to direct your attention to an extended period of time, some of which we have been talking about today, but ask a series of generalized questions, and then come into it in more detail.

And the time period that I'm focusing on is the year 2004 to 2007. Okay? Is that time period clear to you?

A Yeah.

Q Beginning in or around 2004 and continuing to 2007, did you obtain confidential non-public material information from [958] your brother, Maher Kara?

A Yes.

Q And in this period, did you use this inside information to trade securities?

A Yes.

Q When you did that, sir, did you understand that it was illegal to do that?

A Yes.

Q Have you ever had any special training in the laws of securities regulation?

A No.

Q Have you had any special training in the laws of insider trading?

A No.

Q So, at the time you are doing this, how did you know it was illegal?

A Just newspaper articles and things of that nature.

Q And, did the material non-public information that you got from Maher Kara give you an advantage in your own mind over other investors in the marketplace?

A Probably.

Q How could having inside information give you an advantage over other investors?

A It would give me – it give me advantage, because it would provide for me timely information that the average person does [959] not have access to. Therefore, it would provide for me access to stocks, options, and what have you, that I can capitalize on, that the average person would never have or dream of.

Q Okay. And they wouldn't have it, because it wasn't known to the public. Is that right?

A Exactly.

Q And, is that what made it valuable information to you?

A Yes.

Q Precisely the fact that others in the marketplace did not have it.

A No.

Q All right. So in this period, Mr. Kara, did you share some of this confidential non-public material information, this inside information that you were obtaining from Maher Kara, with other persons?

A Yes.

Q Keep the microphone up to you.

A Yes.

Q Okay. And, did you inform any of those persons that any of your information was coming from your brother, Maher –

MS. SHIFMAN: Objection. Leading.

THE COURT: Overruled.

MR. REEVES: I'll start again.

BY MR. REEVES:

Q Did you inform any of those persons that your information [960] was coming from your brother, Maher Kara?

A Yes.

Q And was the fact that you were getting inside information from Maher Kara something that you wanted to be careful about before you shared it with others?

A Yes.

Q Mr. Kara, who were the persons to whom you disclosed the confidential, non-public, inside information, and also disclosed that it was coming from your brother, Maher?

A Joseph Azar, Nasser Mardini, and Bassam Salman.

Q And, in time, if you recall, who did you disclose that information to first? Who did you first

disclose that you had inside information and it was coming from Maher, of the three people you just mentioned?

A Sam Salman.

Q I would like to show you what has already been received in evidence as Government Exhibit 1.

MR. REEVES: If I again may approach, please?

THE COURT: Yes.

(Document displayed)

BY MR. REEVES:

Q Mr. Kara, do you recognize some of the people on this diagram?

A Yes.

Q Does this fairly and accurately summarize at least three

* * *

[976] sort of fluid. It was on hold. They didn't know what to do. So, the situation came to a halt.

Q As to the wedding planning.

A Correct.

Q Okay. Pending, you know, the duration of your father's illness?

A Exactly.

Q All right. So, again, in or around September, 2004, did Bassam Salman, as part of the Salman family, visit with the Kara family while your father was sick?

A Yes.

Q And do you remember him coming to visit you during that time period?

A Yes.

Q And, around this time, did you and Mr. Bassam Salman have an opportunity to discuss the stock market?

A Yes.

Q Do you recall those discussions?

A Yes.

Q What do you recall discussing with him about that?

A It was our first introduction, you know, to the stock market at that time.

Q What do you mean by that?

A Well, it was the first serious introduction to basically exchanging ideas and exchanging information. It's the first [977] time that I basically gave him stock information.

Q So, help us understand the nature of this conversation, this more serious conversation about the stock market that you are describing.

A I – I asked him if he dealt with stocks. And he said, "A little."

And I told him that I dealt with stocks a lot. And I – I gave him the names of certain companies that I was dealing with on a daily basis. Maybe four or five companies.

And, I – I told him, "Go at it. Make some money."

Q And did that begin a more regular discussion between you and Bassam Salman about the stock market?

A Yes.

Q How regularly did you and Mr. Salman then begin to discuss investing?

A Very regularly.

Q So, tell us what you mean by that.

A We talked at least twice to three times a week.

Q And, now, through that time, was there anything that Mr. Salman indicated about his level of knowledge relating to options investing?

A He said from the get-go, that he did not do options.

Q Okay.

A He was very honest with me.

Q And did you and he discuss options investing?

[978] **A** Yes.

Q What did you talk about?

A I told him about Street Smart Pro, and I think we sat down on the computer, and we showed the – we ran – we had some dry runs. And we – we sort of, like, made believe that this is an option transaction.

And, we – I showed him Street Smart Pro, and how it acted. And we explored the different avenues and the different transactions that it went through.

Q And were you teaching him, in any sense?

A Yes.

Q So there was this dynamic in which you were showing him. Is that your testimony?

A Yes.

Q Okay. And thereafter, what, if anything, did you understand Mr. Salman was doing with the information that you taught him about Street Smart Pro?

A He called me back, and he said that he started to buy.

Q He started his own investing?

A He started his own investing.

Q All right. Now, in this time period through the fall of 2004, during these more regular discussions, as you've described them, did Bassam Salman ask any questions about where your investment strategies were coming from?

A Yes.

[979] **Q** What kind of questions did he ask?

A Direct.

Q Direct, okay. What did he ask you?

A "Where was the source of this information coming from?"

Q And what did you tell him?

A "Maher."

Q And, what else did you discuss on that subject?

A Um, the companies, how were we coming up with the companies. Which companies were involved, and why. Which companies are –

MS. SHIFMAN: Objection, Your Honor. Very general. No time frame, no companies, no dates.

THE COURT: Overruled. You can continue.

THE WITNESS: Well, let's break it down.

BY MR. REEVES:

Q You're doing fine. Just keep going with your answer. Tell us what you mean.

A Yeah. The first companies that we discussed were basically very simple. The companies that we discussed were one-drug companies. And the companies that we discussed were Pain Therapeutics, Endo, Amylin, and Encysive.

Then it became more developed, as time went on. This is now in the September to November 2004 arena.

As time – in the fullness of time, things got a bit more complex. Now, we're dealing with basically January to May of [980] 2005. He needed to make more money.

So, things, I had to give him more. So I started throwing in more companies. And then, any time a major deal came in, he was the first on my phone list.

Q So, what was your motivation in helping him this way, in the way you've just described?

A My motivation for helping him, he was my family. Number one. And number two, the most important fact was Maher was marrying their sister.

Q What do you mean by that? I mean, what – what was the motivation?

A Maher was marrying – Maher was marrying their sister. And it was of tremendous importance

that Maher was, in their eyes, you know, the number-one person. And, you know, it was very basic. It was a very basic understanding.

Q In your own mind, how did your discussions with Mr. Salman about the stock market promote the extent to which Maher was the number-one person in their eyes? What do you mean?

A Well, you know, what I meant by that was that they needed to understand that Maher was the source of the information. And that Maher was the source of this capital that was being infused. And as such, they need to look at Maher from a different perspective.

Q What perspective were you encouraging?

A A gentleman, a man who's about to make them rich.

[981] **Q** Okay, fine. Okay, what's the – in your discussions with the Salmans, including – withdrawn.

In your discussion with Bassam Salman, –

A Yes.

Q – was there any sense that that was an important priority for Mr. Salman, for the marriage of his sister, Susie?

A Exactly.

Q That Susie marry someone who would be rich, for example?

A Susie would be very comfortable and well taken care of.

Q Was that important to Mr. Salman?

A Very important.

Q All right. So, let me direct your attention to on or around November 12, 2004. At or about that time, did you invest in Amylin?

A Yes.

Q All right. I would like to display the second page of Exhibit 112, and Mr. Kara, if you would please look at Exhibit 112.

(Document displayed)

Q Exhibit 112 which is being displayed, those are portions of your trading records. Is that correct?

A Yes.

Q All right.

MR. REEVES: And if we could enlarge the top part of the document, and highlight the trading that is occurring in [982] Amylin on or around November 12th.

(Document highlighted)

MR. REEVES: That's great, that line there. Just above it –

(Document highlighted)

MR. REEVES: Okay. And maybe extend to the trading above it.

(Document highlighted)

MR. REEVES: Great.

BY MR. REEVES:

Q So, on the screen is a copy of your trading records that reflects a trade on or around November 12, 2004, in Amylin. Do you see that, Mr. Kara?

A Yes.

Q What were the circumstances under which you invested in Amylin?

A Amylin manufactured an anti-diabetic drug. And, it was a very unusual drug. And Amylin was a one-drug company, waiting to be acquired. And so, I started buying calls in Amylin.

Q Okay. Did you discuss Amylin with your brother, Maher, in or around this time period?

A Yes.

Q And what information did you learn about Amylin from your brother?

A That Amylin would be acquired within a matter of maybe six [983] months.

Q And so, what effect did his death have on you, sir?

A It was devastating.

Q And, were there times following your father's death when you felt like hurting yourself?

A Yes.

Q Taking your own life?

A Yes.

[987] **Q** Yes?

A Yes.

Q And was that because of the grief associated with your father's passing?

A Yes.

Q Let us move a little bit further forward, now, to the memorial service. Did that occur in or around late December, 2004?

A Yeah.

Q Do you remember the memorial service?

A Yes.

Q Do you remember Bassam Salman coming to the memorial service?

A Yes.

Q And at or about this time, when Mr. Salman came back to California from Chicago, did you have another opportunity to speak with him about the stock market and about investing?

A Yeah.

Q Did your conversation in a sense continue from the one you had had earlier that year?

A Yes.

Q Describe what you and Mr. Salman talked about when he came out to California in late 2004, about the stock market.

A We – at that time, Bassam helped me, after – right after the memorial service, at the house. And he saw a significant [988] amount of papers in – in my office. And, he helped me turn the papers around, because it was a lot – 150 people coming to the house. And then, I think he noticed the magnitude of the operation.

Q What do you mean by "the magnitude of the operation"?

A That I wasn't watching a stock or two, and I wasn't a novice at this. That I was really doing this full-time.

Q Go on. What happened, as you and he are – are going through your papers?

Q Okay. And did that make it a better or worse investment, from your perspective?

A A better investment.

Q Because it would be acquired?

A Yes.

Q And the price might go up.

A Yes.

Q All right. In this time period, at or about the time that you are investing in Amylin, do you recall discussing it with Mr. Bassam Salman?

A Yes.

Q What, what do you recall about that discussion with Mr. Salman?

A I told Bassam that Amylin would be a prime company to be acquired, because it was a one-drug firm at the time. And that, to buy Amylin.

Q Did he ask you any questions?

A No.

Q So what happened, to the best of your knowledge?

A Um, to my knowledge, he was mirror-imaging my trades. Anything I – anything that I bought, Bassam was buying. I was very transparent with him.

Q He was mirror-imaging your trades?

A Yes.

* * *

[986] **Q** Was there a funeral?

A Yes.

Q All right. And thereafter, was there another memorial service, approximately 40 days later?

A Yes.

Q Is that later in December?

A Yes.

Q Mr. Kara, was that a difficult time for you?

A Very.

Q Would you help the jury understand the difficulties that the death of your father created for you?

A My father died young. He was a very young man. He was 64 years old. And the relationship between myself and my father was a very close relationship. He was like – we were like almost brothers. You know. There wasn't much age difference between us, you know. And, so, as such – and we worked together for 20 years in the industry.

So, this is – this is very important, you know, for me.

A We – I – afterwards, we had a chance to talk. And, and he specifically asked me, "Where's the source of all of this information?" You know.

And I told him, specifically, "Maher."

Q And did you continue to talk about the investment strategies that you were pursuing at that time?

A Yes.

Q Did any of those investment strategies include the company known as Encysive?

A Yes.

Q I would like to show you again a portion of Exhibit 112, Page 3.

MR. REEVES: If we could, please, have that displayed.

(Document displayed)

MR. REEVES: If we could enlarge it, and highlight [989] the investment in Encysive that occurs on or about December 22nd.

Yes, excellent. Thank you.

(Document highlighted)

BY MR. REEVES:

Q On or about December 22, 2004, did you invest in call options relating to Encysive pharmaceuticals?

A Yes.

Q And, why did you invest in Encysive at this time?

A Encysive was coming up with a drug for poly-arterial hypertension. And, it is a one-drug company. All one-drug companies get acquired. And, that's the main reason why I'm buying calls in Encysive.

Q Okay. And, did you speak about Encysive with your brother, Maher Kara?

A Yes.

Q Did, did he – what information did he provide you about Encysive?

A That it will be acquired by Pfizer one day.

Q Was that confidential information, to the best your knowledge?

A Yes.

Q Was it material, non-public information?

A Yes.

Q Coming from Citigroup?

[990] **A** Yes.

Q Did you discuss your investing in Encysive with Mr. Salman?

A Yes.

Q And do you recall the substance of your discussion with him?

A Um, I did – that was one of the companies that I gave him.

Q Okay. What did you tell him, if anything, about why he might consider investing in Encysive?

A It was a one-drug company, that it would be acquired. And to load up on Encysive.

Q What does "load up" mean?

A Start buying calls.

Q Start buying calls. Okay. And, All right. Did you have to – and still in this period – walk him through the steps associated with options trades associated with Encysive?

A Yes.

Q Was that time-consuming?

A Yes.

Q So, how long would the series of trades associated with Encysive, how long would something like that take?

A We spent few hours. We spent few hours, initially, together.

Q All right. All right, good.

* * *

[997] **A** Yes.

Q In this time period, in or around February 2008, were you investing in PDLI?

A Yes.

Q And what type of investment were you making?

A Puts. Buying puts.

Q Do you want to look at the exhibit, or do you want to look at the screen?

A I'm looking at both.

Q Okay. All right, good. Why were you investing in puts?

A Because I was expecting the price, the stock price, to – to drop.

Q Why did you expect the stock price to drop?

A Because the company was making a significant acquisition. And, it was a structured-debt deal. And usually the structured-debt deals, the price of the stock goes down. At least, that's what I was hoping for.

Q And why is it advantageous to buy puts if you are expecting the stock price to go down?

A That's – that's how you hedge your – your exposure, is by buying puts.

Q As versus, a call is a bet that the stock is going to go up?

A Is going to rise.

Q But the put is a bet that the stock price is going to go [998] down.

A Correct.

Q Okay. And, in this time period, were you talking about the financing associated with this transaction with Maher?

A Yes.

Q Okay. Was that relevant to your information?

A Yes.

Q At that time, was that confidential information known to the investing public?

A I think so.

Q At that point, it was?

A Yeah.

Q Okay. And, and, do you recall in this time period, talking with Bassam Salman about this investment decision?

A Yes.

Q What do you recall discussing with him?

A To buy puts on PDLI.

Q Had he ever invested in puts before, to the best of your knowledge?

A No.

Q So, did you have to walk him through that?

A Yes.

Q Was that time-consuming?

A Yes.

Q Another learning curve, in a sense?

* * *

[1000] **A** Because the two companies took a significant hit. And, the – the share prices went down significantly. So, I was buying these two companies at a significant discount.

Q All right. And, did you discuss your trading with Bassam Salman in this time period?

A Yes.

Q And, what did you and he discuss with regard to Biogen in or around March, 2005?

A Buy.

Q Buy.

A Calls.

Q Calls. Okay. And, what type of calls, in particular? Did you recommend any particular types?

A Yes.

Q What did you recommend?

A Well, Biogen, it was primarily the January 21st, 2006, 40 and $50 calls.

Q Forty and $50 calls? Okay, good. Now, he's been working – withdrawn.

Bassam Salman has been working on his options trading, according to your testimony, for a few months now. Has he improved as an options trader?

A Very much so.

MS. SHIFMAN: Objection, spec- – speculative. Excuse me.

* * *

[1005] **Q** And why did you want to invest in Pain Therapeutics?

A Pain Therapeutics is a one-drug firm. Remoxy, which was replacing Oxycontin. Because you can crush Oxycontin and snort it, but you cannot crush Remoxy. And so, Remoxy was far superior, and efficacious, and safer.

So. The investment in Pain Therapeutics was a no-brainer.

Q All right. Did you discuss that Pain Therapeutics with your brother, Maher?

A Yes.

Q Did he agree with you it was a no-brainer?

A Yes.

Q What, in substance, do you remember him telling you about Pain Therapeutics?

A Buy.

Q All right. And, did you discuss your investment decision in Pain Therapeutics with Bassam Salman?

A Yes.

Q What do you recall discussing with him?

A I told him it was a one-drug firm, and all one-drug firms will be acquired.

Q All right. And, what, what type of securities did you settle on buying in this time period? What did you invest in?

A In Pain Therapeutics, you mean?

Q Yes.

A I was buying the April 16, 2005, $7.50.

* * *

Volume 5
Pages 1025-1334

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA,	)
Plaintiff,	) NO. CR 11-0625 EMC
vs.	) San Francisco, California
BASSAM YACOUB SALMAN,	) Monday
	) September 23, 2013
Defendant.	) 8:29 a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Ave.
San Francisco, California 94102
BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

[MICHAEL KARA – DIRECT/REEVES]

[1066] **Q** And what do you recall discussing with him during that time?

A Whether this one-drug company will be acquired one day.

Q And what, if anything, did he tell you about that?

A "Yes."

Q So, was that an important piece of information for your investing decision?

A Yes.

Q Okay. To your knowledge, was that confidential information in this time period?

A Yes.

Q Okay. Now, during this time, did you also have an opportunity to discuss your investing decision in APPX with Mr. Bassam Salman?

A Yes.

Q Do you recall the substance of that discussion?

A Um, not – not in April, but earlier on, I had discussed APPX with Mr. Salman.

Q Do you remember approximately how much earlier?

A The discussion of APPX must have happened in the beginning of '05.

Q Okay. And what was that discussion again, please?

A That it's a one-drug company, and all one-drug companies will be acquired at one time or another. Please maintain your call position on that company.

[1067] **Q** And in or around the time of this investment, do you recall one way or the other whether you discussed with Mr. Salman your decision to make another investment in APPX, even if you didn't go into the background reasons for why?

A Every – every time I made a position, I took a position, I called Bassam and I informed him that I was taking up a position in APPX. Or taking up a position in Novartis.

I was completely transparent with Bassam. So if I took up a position for the day, I would call him up and I would tell him what I bought. So that our trading records would mirror-image each other.

Q All right, good. Thank you very much. I would like to now look at Exhibit 113, please. Specifically Page 2. (Document displayed)

MR. REEVES: And specifically the –

(Document highlighted)

MR. REEVES: Okay. Thank you.

BY MR. REEVES:

Q And, look at your trading in a company known as Bone Care. Do you see that highlighted on the screen?

(Witness examines document)

A Forgive me, Page 2?

Q Page 2 at the top of the page. And also on your monitor, the relevant trade should be highlighted.

Do you see it, Mr. Kara?

* * *

[1072] right?

A Yes.

Q Do you remember making a decision to invest in Bone Care in or around May 2nd, 2005?

A Yes, sir.

Q And, just tell us generally about your decision to invest in Bone Care at this time. What do you recall happening?

A On or – on or about April 27th, I – I did receive a phone call from Maher, informing me of Bone Care. That Bone Care will – will occur within a very short period of time. That there will be a takeover of this company.

And then, the – we purchased in Fidelity's account, which is shared, you know, by myself and Emile.

Q Uh-huh.

A Bone Care does not have any options. It's purely a stock fade. So the ones that you see before you are just basically stocks in Bone Care.

Q Was this during the period of your convalescence from your surgery?

A Yes.

Q Do you remember being in pain during this period of time?

A Yes.

Q So how were you able to carry out these trades?

A By sitting in front of the computer. This activity doesn't take much. It takes maybe five minutes.

[1073] **Q** To trade in stock?

A To – yes.

Q As versus trading in options? Is that more time-consuming?

A Very much so.

Q All right. Okay. Was this – withdrawn.

You said that your brother, Maher, called you and spoke to you about Bone Care. Is that correct?

A Yes.

Q Was the information that he gave you confidential, non-public information?

A Yes.

Q Was it valuable to you?

A Yes.

Q How was the possibility that Bone Care would be taken over be valuable?

A Because – because it's non-public information. And, we – you know their share price is about to rise, so you buy the company low and you sell it high.

Q Do you have a recollection for – about why you carried out this trade in Mr. Jilwan's account?

A I don't think I had enough money in my own account.

Q All right. In this time period, do you recall discussing your decision to invest in Bone Care with Bassam Salman?

A Yes.

[1074] **Q** What do you recall in substance discussing with Mr. Salman about Bone Care in this time period?

A I – I called Bassam, and I believe I told him that "I have a good one for you. And it's going to happen in very few days." And I spelled Bone Care for him, "B-O-N C-A-R-E."

Q All right. Good. Thank you. I would like to move forward a few more weeks.

MR. REEVES: If we could go back to Exhibit 112 and display Exhibit 112, Page 18, please.

(Document displayed)

MR. REEVES: And if we could display the top half of the page, and highlight the trading activity on or around June 21, 2005.

(Document highlighted)

BY MR. REEVES:

Q Okay. Mr. Kara, on or around June 21st, 2005, did you make a decision to invest in Endo Pharmaceuticals?

A Yes.

Q And why did you decide to invest in Endo at that time?

A Endo was coming up with a pain patch. And, which will cause the – the gross revenues at Endo to rise. And so, I bought stock into Endo.

Q Did you discuss this investing decision with your brother, Maher?

A Yes.

[1075] **Q** And what do you recall him saying about Endo at this time?

A That it was a good buy.

Q And, did you discuss your decision to invest in Endo with Bassam Salman?

A Yes.

Q Do you recall the substance of that discussion with Mr. Salman?

A As I mentioned, that Endo was coming up with some new drugs, and that Endo would be a good buy, to buy some calls and/or stock into Endo.

Q And what type of securities did you acquire in Endo at or around this time?

A I bought stock.

Q All right. Thank you very much.

Let me direct your attention to the next month, to in or around early July, 2005. At or about that

time, did you attend a wedding of your brother Maher to Susie Salman?

A UH, yes.

Q From early July, 2005?

A Yes.

Q Do you remember the wedding?

A Yes.

Q Would you please describe the wedding weekend to the jury?

A The wedding occurred over a period of maybe three-four days. And, it was a very happy occasion. And, we – we

* * *

[1079] **A** Yes.

MR. REEVES: At this time, I offer Exhibit 139 into evidence.

MS. SHIFMAN: No objection, Your Honor.

THE COURT: All right, 139 is admitted.

(Trial Exhibit 139 received in evidence)

MR. REEVES: And I'm going to ask at this point that it please be displayed, and played for the jury.

THE COURT: Okay. Permitted.

(Video played, not reported)

BY MR. REEVES:

Q Mr. Kara, was that a happy occasion?

A Very much so.

Q Let's focus a little bit on the wedding weekend, and the time that you spent with Bassam Salman.

So over the course of the three days in Chicago, relating to the wedding events, how much of your time did you spend with Bassam Salman?

A Seventy-five percent of my time.

Q And what sorts of things did you do when you weren't attending the actual wedding, or the wedding ceremony?

A Took me around. He showed me Chicago. Basically, he was with me the whole time.

Q Did you enjoy that opportunity to spend that time with Mr. Salman?

[1080] **A** Very much so.

Q All right. In the course of that weekend, did you have an opportunity to visit Mr. Salman's place of business?

A Yes.

Q Do you recall that –

THE COURT: Excuse me. Can you pull the microphone a little –

(Request complied with by the Witness)

THE WITNESS: Forgive me. Forgive me have.

BY MR. REEVES:

Q Keep it close to your lips, if you would, please.

Do you recall visiting his place of business?

A Yes. Forgive me.

Q And, did you get a tour, in a sense?

A Yes.

Q Please describe what you remember happening.

A Bassam took me to his place of business. It's a large wholesaler for grocery items and what have you. And we toured the place.

And own our way out, I noticed he – he was showing me out. And I noticed a small office. I think he either probably motioned it, motioned it to me or I watched it myself, a small office towards the entrance of the building.

The office was heavily littered with papers. The papers were primarily business records and what have you. But,

* * *

[1082] door at that time.

Q Could you see into the office?

A Very much so.

Q And see the papers that were in it, for example?

A Very much so.

Q Were there other people around in the warehouse?

A Yes.

Q All right. So, is that the reason you asked to speak with Mr. Salman outside?

A Yes.

Q All right. Go on. What happened next, after you go outside?

A Bassam came. And I said, "Could we go somewhere?" And he said, "Sure." We got into the car. And he turned on the car, and then we started talking in the car.

Q What was said?

A I basically informed him that the reason why I wanted to talk to him was because of the situation that was inside the office. And the presence of these papers that I saw.

And, I think he detected the tone of voice. I was speaking a little bit in a louder tone, you know. And, he got concerned.

And I basically told him, point-blank, you know, "You need to be very careful with these pieces of paper. And what do you think is the source of all of this information?" And I [1083] answered it for him, and I told him, "Maher. Maher is the source of all of this information."

And he was – he was stunned. He was perplexed, looking at me. And he responded to me by saying, "Then we have to protect him."

Q What did that mean to you, "We have to protect him"?

A We have to be careful. We have to do whatever we have to do to be careful.

Q And, what about the conversation was perplexing? Did it relate to the documents that you were drawing attention to, for example?

A I think – I think he was just – the whole – the whole thing was just perplexing for him, that I noticed that there were a few papers, you know, in the – on the floor, on the credenza, on his desk, that dealt with stocks that we were trading in.

Q At that time, did you think that it was important to keep the stock trading information that you and he shared more confidential?

A Very much so.

Q To put it away, for example?

A Very much so.

Q Was that the thrust of what you are communicating to –

A Absolutely.

Q Okay. What, if anything, did he say he would do?

[1084] **A** He would shred all of the papers.

Q He would what?

A Shred them.

Q Okay. Were there any other ways to protect Maher?

A That wasn't discussed.

Q Okay. But, he would clean up the papers.

A Exactly.

Q All right. Okay. During the course of the wedding weekend, did you have an opportunity to discuss a company known as Celgene?

A (Nods head)

Q Do you recall that discussion?

A Yes.

Q Did you discuss it with Mr. Salman?

A Yes.

Q I would like to show you what has been marked as Government Exhibit 113 again, Page 3, please.

(Document displayed)

BY MR. REEVES:

Q Do you still have that up there?

A Yes.

MR. REEVES: All right, and if we could please highlight the portion of Exhibit 113, Page 3, that reflects trading on or about July 8th, 2005, in Celgene.

(Document highlighted)

[1085] **MR. REEVES:** That's great. Okay, good. Thank you very much.

BY MR. REEVES:

Q All right. Why were you interested in Celgene in or around early 2005, Mr. Kara?

A Celgene was a very promising company. It was – it manufactured a drug for leukemia. And, the drug has many applications. And, the company was so promising that it was going to be the next Genentech.

Q Did you discuss Celgene at all with Maher Kara?

A Not at that time. But later on, yes.

Q So was your interest in Celgene the product of your own research, in any sense?

A Yes.

Q As versus something that you would talk through at the time you were looking at it, with your brother Maher.

A Correct.

Q All right. In this time period, in around – on around July 8, 2005, did you discuss Celgene with Mr. Bassam Salman?

A Yes.

Q Do you recall the substance of that discussion?

A Yes.

Q And what do you recall telling Mr. Salman about Celgene?

A He had asked me for a good tip. And I told him that I'm buying Celgene. And, that it showed a lot of promise, and [1086] that it would go up – the share price would go up in the next week or two. And that he should take a position in Celgene right away.

Q Did he seem interested in what you told him?

A Absolutely.

Q How do you know that?

A He told me to cover a little bit, you know, for – for him at the party, and that he would go make a transaction and come back.

Q Was he gone from the party for a little while?

A Yes.

Q How long was he gone for, for example?

A A couple of hours.

Q A couple of hours?

A Yes.

Q Did you cover for Bassam Salman during the party?

A I don't know what that meant, but that – that's what was said.

Q Did you try to cover for him?

A I guess so.

Q Okay, good. Now, in your discussion with Bassam Salman about Celgene, at any point did you tell him that the source of your information was your own research, as versus coming from Maher?

A No.

* * *

[1090] **Q** All right. In or around this time period, did you discuss your trading and your investment decision relating to Genentech with Bassam Salman?

A Yes.

Q Do you recall the substance of that discussion?

A My same explanation. That Avastin was going to be a billion-dollar drug, and that the income from that drug will help the gross revenues of Genentech.

Q And based on that information, what, what type of securities did you buy?

A I purchased the January – forgive me. At Genentech, I purchased, yeah, the January 1, 2006 calls.

Q Calls at what strike price?

A 85.

Q Would you have discussed the particulars of your investing decision with Bassam Salman?

A Absolutely.

MR. REEVES: Let's go forward to Exhibit 112, Page 10, next page, please.

(Document displayed)

BY MR. REEVES:

Q And if I can direct your attention to the portion of the page in the middle, three trades up from the black dot in the middle, a convenient measuring here, on or around October 11, relating to Cephalon.

* * *

[1092] Cephalon. And Cephalon will most likely be acquired.

Q All right. And in or around this time period, did you also discuss your decision to invest in Cephalon with your brother-in-law, Bassam Salman?

A Yes.

Q And, do you recall the substance of that discussion?

A Yes.

Q What did you and Mr. Salman discuss regarding Cephalon in this time period?

A I told him that Cephalon is a one- or two-drug company, to go ahead and buy some calls in Cephalon.

Q All right. And did you discuss the specifics of your – of the securities that you recommended that he buy?

A They mirror-imaged whatever I was buying. I told him what I was buying.

Q You told him what you were buying, so that he could do the mirror-image trading?

A Correct.

Q Of your trading.

A Yes.

Q All right. Okay, good. Drop the microphone just a little bit, to your mouth.

(Request complied with by the Witness)

Q I'm done with that exhibit. We will put that away for the moment.

* * *

[1098] **A** No.

Q Okay. As you look back on this incident, where you are digging with your hands in the backyard, what do you think about it today?

A It – it was stupid.

Q Okay. All right. Why was it stupid, Mr. Kara?

A Because it – the wires never existed. And there was no camera.

Q Do you think the incident with the wires and the digging and the ladder was a product of the anxiety associated with your conflict with the neighbor?

A Not only that, but I had been very depressed and I was taking Zoloft. And I increased the dosage of Zoloft to three times the recommended dose. And so that makes you manic. And, I think that had affected me tremendously.

Q Did you work on that problem in the – in your medications with Dr. Woolery, thereafter?

A Immediately.

Q Were you able to get the mixture of your medicines corrected?

A Yes.

Q Now, in or around this time period, in or around February of 2006, shortly after the time of the events you have been describing, did you make a decision to move from your home in Vallejo?

[1099] **A** Yes.

Q And where did you move to, temporarily?

A My mom's home.

Q And in what city is that located?

A Also in Glen Cove, Vallejo.

Q Okay. Did that create a greater separation between you and this neighbor?

A Yes.

Q Did that help in any way with your symptoms?

A Immensely.

Q And thereafter in 2006 did you make a decision to move from Vallejo altogether?

A Yes.

Q And where did you move to?

A Walnut Creek.

Q And, once you made the decision to move away from the neighbor, in the manner you have described, did the problems that you had been experiencing in early 2006, did they get better or did they get worse?

A They got very much better.

Q How did they get better?

A There was absolutely no problems any more.

Q I would like to go back, if I could please, to Exhibit 112, Page 13, please.

(Document displayed)

* * *

[1101] **MR. REEVES:** Okay, good.

BY MR. REEVES:

Q Sorry about that, Mr. Kara. I wanted to talk to you about Andrx.

In or around February, on or about February 24, 2006, did you make a decision to invest in Andrx?

A Yes.

Q All right. Is that what's now reflected on Exhibit 112?

A Yes.

Q Okay. And, why did you decide to invest in Andrx in or around February 24, 2006?

A Andrx was a pain company. And, I had received some information from Maher that this company will be acquired in a matter of a week or so. So, we started loading up on Andrx calls.

Q Was the information that you obtained from Maher Kara relating to Andrx confidential information?

A Yes.

Q Was it non-public?

A Yes.

Q Was it inside information?

A Yes.

Q And, was it valuable to you?

A Yes.

Q Why was it valuable to you?

[1102] **A** Because we were going make some money.

Q How would you make money, given what Maher had told you?

A We would buy the calls low, and we would sell them high after the acquisition.

Q After the acquisition had occurred?

A Correct.

Q And, in that way you hoped to profit.

A Correct.

Q All right. Now, did you, in this time period, also discuss your decision to invest in Andrx with your brother-in-law, Bassam Salman?

A Yes.

Q Do you recall the substance of that discussion?

A Yes.

Q And, what, in substance, do you recall discussing with Mr. Salman?

A I told Bassam that, "I have a good company for you, that's a definite takeover." And, "Start loading up on calls."

Q Now, at the time that you told him it's a takeover, that it's a definite takeover, was there public knowledge?

A No.

Q And, what happened next? What, if anything, did Mr. Salman do, or say to you?

A He was buying calls.

Q And according to the trading records, what securities did

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[1106] **Q** Okay. And why did you decide to invest in HCA in this time period?

A I saw HCA in the *Wall Street Journal*. And so, I thought it was – that there was going to be an acquisition of this particular company. It was ready for that.

Q All right. In this time period, in the summer of 2006, do you recall discussing HCA and other hospital-related companies with your brother, Maher?

A Yes.

Q What do you recall discussing in that time period with Maher Kara about that subject?

A I had the stocks that I had on that hit list divided up into different groups. You know, anti-cancer, cardiovascular, hospitals, et cetera. In that hospital group, there was LifePoint, WellPoint, HCA, USPI, that sort of thing. So I had all these discussions with Maher about the appropriateness of these companies. And HCA was one of them. Although HCA did not come from Maher.

Q Okay. But you talked about him in – withdrawn

You talked about HCA in the sense that you just described, talking about a collection of hospital stocks.

A Correct.

Q All right. And in this time period, in or around July 21, 2006, did you speak with Bassam Salman about your investing decision in HCA?

[1107] **A** Yes.

Q And do you recall the substance of that discussion?

A I mentioned HCA as a great target for takeover. And that I was going to invest in it. And I left it at that.

Q All right. And what securities did you decide to buy in HCA in or around this time period?

A I bought the August 19, '06, 47.50 calls.

Q Did you discuss the types of securities that you were going to invest in with Bassam Salman?

A I was very transparent with Bassam. Whatever I bought, I always told him.

Q All right. Let's move forward to a little bit later, next month, in or about August, in or around August 8, 2006. At or about that time, did you make a decision to invest in USPI?

A Yes.

MR. REEVES: I would like to display, please, Exhibit 112, Page 15, please. And if we could highlight the first trade in the record, please.

(Document highlighted)

BY MR. REEVES:

Q Now, does "USPI" stand for "United Surgical Partners International"?

A Correct.

Q Why did you decide to invest in USPI in or around August 8, 2006?

[1108] **A** Maher called and said that there's – there's a company that has these clinics that are surgical clinics. And Welsh Carson would probably be the acquirer, and to go ahead and take a close look at it. And, "You may want to take a position in it."

Q And what company had the surgical clinics that you are talking about?

A USPI.

Q So did Maher alert you that USPI had these surgical clinics?

A Yes.

Q And that it might be acquired by Welsh Carson?

A Correct.

Q Now, was that confidential information, Mr. Kara?

A Yes.

Q Was it non-public information?

A At the time.

Q Okay. It was unknown to the other investors in the market, to your knowledge?

A Yes.

Q All right. Did you consider it to be valuable information to you?

A Yes.

Q Why was it valuable to you?

A Because you can buy USPI at a reduced price and sell it [1109] later at a high price.

Q All right. Now, did you discuss your decision to invest in USPI with your brother-in-law, Bassam Salman?

A Yes, I did.

Q Do you recall the substance of your discussion with Mr. Salman about USPI?

A Yes.

Q What do you – did you and Mr. Salman discuss regarding USPI?

A I told him that, "I have this company which is a hospital – it's a hospital stock. There's an issue with it, though. We're not sure when the transaction will occur, but I will – I will check with Maher, and I will get back to you as soon as possible. So go ahead and take a position in it, but we'll get back to you as soon as we have more information from Maher."

Q And when you were discussing with Mr. Salman that you were not sure when the takeover or the acquisition would occur, what did you mean?

A We were not sure when the closure date would be. We knew – we knew that it will happen, but we were not sure when, at the time.

Q And so what did you tell Mr. Salman you would do in order to be more sure?

A We will check with Maher.

[PROCEEDINGS]

[1110] **Q** That you would check with Maher?

A Yeah.

Q And get back to Mr. Salman?

A Yes.

Q Okay.

MS. SHIFMAN: Your Honor, perhaps, if we are done with this area, perhaps this is a good time for the morning break?

MR. REEVES: We're not done.

THE COURT: Well, as soon as you finish the USPI one.

MR. REEVES: Sounds good, Your Honor.

BY MR. REEVES:

Q What securities did you decide to invest in USPI in this time period?

A It appears that it was mostly the November 18, 2006, $25 strike price.

Q All right. Good. And did you discuss the details of that investment with Bassam Salman in this time period?

A Yes.

Q All right.

MR. REEVES: Your Honor, I would like to finish with USPI, if I could, and then take a break. It might take me a few minutes.

What is the Court's preference?

THE COURT: How long will it take you?

* * *

[MICHAEL KARA – DIRECT/REEVES]

[1117] **THE COURT:** Sustained.

BY MR. REEVES:

Q Was this at or about the time that you called Mr. Salman about USPI?

(Witness examines document)

MS. SHIFMAN: Your Honor, I'm going to object. The witness is looking at some other document.

(Witness examines document) before that

THE COURT: All right. You can answer the question if you recall, and then if you need to refresh your memory we have to indicate that for the Record.

So, based on what you know, you can answer the question.

THE WITNESS: I can't remember.

BY MR. REEVES:

Q Do you remember talking with Bassam Salman in or around early August, 2006, about USPI?

A Yes.

Q At or about the time that you made your investment in USPI?

A Yes.

Q But you are not sure if this is necessarily that phone call. Is that your testimony?

A Correct.

Q All right. Good.

Now, in this time period – thank you, I'm done with that.

[1118] (Off-the-Record discussion between counsel)

BY MR. REEVES:

Q In or around this time period, Mr. Kara, did you discuss your decision to invest in USPI with other people besides Bassam Salman?

A Yes.

Q Did you speak with USPI about Mr. Joseph – with Mr. Joseph Azar?

MS. SHIFMAN: Objection, leading.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. REEVES:

Q Okay. Let's talk about Mr. Azar in this time period. In or around the time that you decided to oh invest in USPI, do you recall the substance of your discussions with Mr. Azar about USPI?

A I think so.

Q Okay. Tell us what you remember.

A I – again, I mentioned to Mr. Azar the same thing that – that I had mentioned before. That there is a company that will most likely be acquired. The only issue would be we don't have the target date of the acquisition. And, it was left at that.

Q What, if anything, did he say?

A He – he thanked me. And, and it was left at that.

[1119] **Q** All right. And, in this time period, do you recall speaking with Nasser Mardini about USPI?

A Yes.

Q Okay. Do you recall the substance of your discussion with Mr. Mardini?

A Uh, not really.

Q Okay. Do you foreclose the possibility that you spoke with him about USPI?

A I did speak to him about USPI.

Q So, you are sure you spoke with him about USPI.

A Yes.

Q But you don't recall the details any further?

A No.

Q All right, fine.

Now, how did USPI unfold? Did – how long did you continue to invest in USPI?

A Significant number of months.

Q Through the fall of 2006?

A Yes.

Q Did that have an effect on your investment strategy?

A Big time.

Q Describe what type of an effect it had.

A We were buying short-term calls, only to have to liquidate them, to fall back. And, for the calls to expire. And, become worthless. And then only to find out that first it was [1120] going to be November, so we would buy in December calls. And then, finding

out that it's not going to be December, it's going to be something else. So, we lost quite a bit of money.

Q Because the – the corporate transaction, the takeover was taking longer than you expected?

A Yes.

Q Okay. So as you are waiting for the transaction to happen, do you speak with your brother, Maher, about that?

A Yes.

Q Do you recall the substance of those – any followup conversations you had with Maher about what was happening with USPI?

A Yes.

Q What, if anything, do you remember Maher telling you?

A To be patient, and once he figures it out he will let us know.

Q Did you discuss the – who it was that was working on the USPI transaction?

A It was a colleague of his.

Q Do you remember that person's name?

A I think Trygve, a gentleman by the last name of Trygve.

Q A colleague at Citigroup was still working on the deal?

A Yes.

Q And approximately how many times did you continue to speak with Maher about following up about what was happening with [1121] USPI?

A Maybe five or six times.

Q And is that through the course of the fall?

A Yes.

Q And, did the discussions that you had with Maher about the delays associated with a takeover of USPI trigger discussions then with Bassam Salman about his investing?

A Yeah.

Q Did you have to follow up with Bassam Salman?

A Of course.

Q What do you recall discussing with Bassam Salman about that?

A I was embarrassed, you know, because at first I thought that we had the – the target date. So I have to be very apologetic from him, you know, because I was concerned that, you know, he may lose his investment.

Q What, if anything, did he say?

A He was very accommodating, and he said not to worry too much. And that when it happens, it will happen.

Q Did you discuss adjusting your investing strategy under those circumstances?

A I did.

(Reporter interruption)

THE WITNESS: I did.

* * *

[1129] did you make a decision to invest in Biosite?

A Yes.

Q I would like to show you what has been received in evidence as Government Exhibit 112, Page 16, please. (Document displayed)

MR. REEVES: And if we could enlarge the top half of the document.

All right, good.

BY MR. REEVES:

Q So according to your trading records, you made an investment on or about March 22nd in 2007 in Biosite. Do you recall that investment?

A Yes. Yes, sir.

Q Why did you make your investment in Biosite?

A I – I called Maher. And, found out that this particular company was going to be acquired by Monday. And the call was on Thursday. So, within maybe a few days, that this particular company was going to be acquired.

Q And do you recall your conversation with your brother, Maher, about Biosite?

A Yes.

Q What do you recall about that conversation?

A This – this particular company makes kits for doctors. For measuring, you know, heart attacks and the aftermath of heart attacks and what have you. And, Maher said that there's [1130] a pending acquisition over the weekend. And, that was the primary, you know, thing that went on between me and Maher.

Q When you called your brother, Maher Kara, did you ask him for information?

A Yes.

Q Why were you asking him for information?

A I – I needed a – I needed a company.

Q Why did you need a company?

A For multiple reasons. The primary reason was there was hardly any money left in the account. Maybe there was 25- to $30,000 left, total, in everything that we had.

And, secondly, some of the people that I was giving the tips to had complained that they needed a tip. And so stupid me listened to one of them. And –

Q Who did you listen to?

A Joseph Azar.

Q Was Mr. Azar complaining in this period?

A Yes.

Q In what sense was he complaining?

A That he was making bad investment choices. And, he needed a tip.

Q So when you spoke to your – your brother, did you speak about your need for information?

A Yes.

Q Okay. And what did you tell your brother?

[1131] **A** I told him that we needed a company.

Q All right. Go on. In the conversation you had with your brother, did he offer to give you money in any sense?

A Yes.

Q Do you remember that happening?

A Yes.

Q Did you take him up on his offer for money?

A No.

Q Why not?

A I was embarrassed.

Q So, what? You wanted information, not money.

A Correct.

Q Okay. And through the course of the phone call, what do you learn about Biosite? What is your understanding about what might happen to Biosite?

A Biosite will be acquired, over – over the weekend.

Q And the phone call was on what day of the week?

A Thursday.

Q Now, when you learned that Biosite would be acquired over the weekend, was that confidential information?

A Yes.

Q Was it non-public information?

A Yes.

Q Was it valuable to you, Mr. Kara?

A Yes.

[1132] **Q** Why was it valuable?

A Because you are buying a company at a normal price and you have one day of trading, Friday. And then, the price – the acquisition would happen

over the weekend. And on Monday, the price will almost double. And then, but the calls will go up dramatically.

Q After you spoke with Maher Kara about Biosite in the manner you have described, did you tell anyone else about Biosite?

A Yes.

Q Who did you tell about Biosite?

A I first phoned Mr. Salman. And then I phoned –

Q Is that the first person you spoke with?

A Yes.

Q What do you remember speaking with Bassam Salman about Biosite?

A I told Bassam that, "I have a good company for you. And this acquisition will happen over the weekend, by Monday. By Monday morning. And you don't have much time."

Q Was there urgency associated with the trading?

A Yes.

Q What was the nature of that urgency?

A The transaction may happen over the weekend. And there's only one day of trading. Because when I called him, the market had closed for Thursday. So,

the phone call happened [1133] after 1:00 Eastern time, you know. So, the market had closed for Thursday.

The only trading time he had was Friday. So he had one day of trading.

THE COURT: Mr. Maher, could you move the microphone closer to your –

THE WITNESS: Forgive me.

So he only had one day of trading left. And so, that was the urgency. It's just one day of trading. That's it.

BY MR. REEVES:

Q Just the Friday, the remaining trading day before the weekend?

A Correct.

Q All right. I would like to show you what has been marked as Government Exhibit 374, please.

MR. REEVES: If I may approach?

THE COURT: Yeah.

BY MR. REEVES:

Q Do you recognize this exhibit?

A Yes.

Q It's another set of your telephone records?

A Yes.

Q For the same account that we looked at before?

A Yes.

Q Is this for the time period in – that includes March, [1134] 2007?

A Yes.

MR. REEVES: At this time I offer Exhibit 374 in evidence.

MS. SHIFMAN: No objection, Your Honor.

THE COURT: 374 is admitted.

(Trial Exhibit 374 received in evidence)

(Document displayed)

MR. REEVES: All right. If we could enlarge the middle portion of the document. Keep going down a little bit. Great. Thank you.

And if we could highlight the – one second, are you on Page 2 of Exhibit 374? We're on the wrong page.

(Document displayed)

MR. REEVES: There we go. Everything is highlighted. Thank you.

BY MR. REEVES:

Q All right. We are on the second page of Exhibit 374, Mr. Kara. Do you see the item numbers on

the left, it looks like there is an Item 54, is a call between you and a No. xxx-xxx-xxxx?

Do you recognize that?

A Yes.

Q Do you know whose phone number that is?

A It's Maher.

[1135] **Q** Maher's cell number. And then, below that, it looks like there is an effort to call, just below that, xxx-xxx-xxxx?

Do you recognize that?

A Yes. That's Joseph Azar.

Q All right. Do you know if you were able to reach him at that time or not?

A No.

Q You were not able to reach him?

A No.

Q And then, down below that, Item 58 is a call to a number, Area Code xxx-xxx-xxxx, in Chicago, Illinois. Do you see that?

A Yes.

Q Do you know whose phone number that is?

A Yes.

Q Whose number is that?

A That's Bassam's.

Q Is this the phone call that you had with Bassam Salman about Biosite?

A Yes.

Q All right. Thereafter, are you able to reach Mr. Azar?

A Yes.

Q Okay. All right. Thank you. I'm done with this.

What happens with your investment in Biosite?

A Um, it – it grows.

* * *

[1141] **Q** What do you remember happening in the car during this visit for Orthodox Easter?

A He – he was very kind and he offered me money.

Q Describe what was said. What's the substance of the conversation you and Mr. Salman have in the car?

A Um, Bassam, Bassam had mentioned that they had made a significant sum of money on the last few transactions. Starting with Bone Care, Andrx, and USPI and Biosite. Specifically, Biosite.

Q (Nods head)

A And that, he wanted to find the mechanism to basically pay me back. I – I told him from the get-go, that wasn't necessary. And, he insisted. So, he had a stack of money with him, and separated by rubber bands. And, so, he insisted, and he kept on pushing the money my way.

And so, I took basically a bundle of money from him, and I told him, "Thank you so much, it's a gift," after he insisted. And that was the end of that.

He offered to buy me a coat because it was freezing outside, and we were near a factory. And from there he took me to the airport, and we left.

Q So when he's offering the money the first time, approximately how much money was he offering you, Mr. Salman – excuse me, Mr. Kara?

A About 30- or $40,000.

* * *

[1151] **A** Mr. Salman came to see me. And, with his daughter. And, he – he basically had an urge to tell me this.

He mentioned that all of – all of the time that – for the last three years, ever since that we were discussing stocks and options and all of this stuff, he was not trading, himself. He was passing this information on to someone else. In Detroit. And – and he was doing it to protect us all. And, he was hoping that I would understand.

Q What was your reaction to that news?

A I was very angry.

Q Why were you angry?

A Because the information is not contained anymore. It's outside his control. And my control.

Q Okay. What about passing the information to someone else in Detroit meant that the information was not contained? What do you mean by that?

A We don't know who – who has the information. Who was it given to. How many people are now trading in that information, and how big is the problem?

Q And, what – did you and Mr. Salman discuss this, this concern you had?

A Yeah.

Q What was his response?

A He assured me that it was just one person.

Q Just one person in Detroit?

* * *

[MICHAEL KARA – CROSS/SHIFMAN]

[1159] And, if you would keep the microphone close to you, I would appreciate it.

THE WITNESS: Yes, sir.

THE COURT: Thank you.

CROSS EXAMINATION

BY MS. SHIFMAN:

Q Good afternoon, Mr. Kara.

A Good afternoon, ma'am.

Q I would like to start with talking about you and your brother, Maher. All right?

You were – you are, excuse me – a little more than ten years older than your brother?

A More like eleven.

Q Eleven years older.

THE COURT: Do you want to lower that mic?

MS. SHIFMAN: Sure.

THE COURT: So the court reporter can hear you. Thank you.

BY MS. SHIFMAN:

Q He was a kid, a child, as you were growing up.

A Yes.

Q You took care of him, correct?

A Yes.

Q You saw him doing well in school?

A Yes.

[1160] **Q** You knew he always got good grades.

A Yes.

Q You watched him go off the Berkeley School of Business?

A Yes.

Q Then off to the University of Chicago for his MBA?

A Correct.

Q And, please keep your voice up. You secretly helped pay for his schooling at the University of Chicago.

A Yes.

Q You never told him.

A No.

Q He got good, even fantastic jobs, once he graduated.

A Yes.

Q He always advanced in his career?

A Yes.

Q That made you proud?

A Yes.

Q And happy, correct?

A Yes.

Q And made everyone in the family happy.

A Yes.

Q As well as proud.

A Yes.

Q He never got into trouble, Maher. Correct?

A No.

[1161] **Q** Not in school, no trouble?

A No.

Q No trouble with the law?

A No.

Q He never cheated?

A No.

Q He always followed the rules?

A Yes.

Q He didn't do any drugs?

A No.

Q And, we saw the wedding video, just earlier on your direct testimony, where you spoke proudly of him.

A Yes.

Q That you went to him for your counsel. Correct?

A Yes.

Q And for advice.

A Yes.

Q That you trusted him.

A Yes.

Q You also testified on direct examination that you suffer from Bipolar I disorder.

A Yes.

Q And, that you were diagnosed with this in 1999.

A Yes.

Q Prior to your diagnosis in '99, you had been suffering

* * *

[1165] **BY MS. SHIFMAN:**

Q Please let me know when you are done reading that.

A Yes.

Q At the time you talked to Dr. Shields, you told him that you intended to fly off the Bay Bridge in that accident. Do you recall that, sir?

A No.

Q No memory.

A No memory.

MS. SHIFMAN: One moment.

THE COURT: Okay.

(Off-the-Record discussion between counsel)

BY MS. SHIFMAN:

Q Since your diagnosis in '99 and even before, you have exhibited various signs of mania. Right?

A Yes.

Q For instance, running out in your yard naked at various times. Do you recall that?

A Yes.

Q Do you recall telling that to Dr. Shields?

A Yes.

Q You have checked yourself into Kaiser as a result of problems with mania, and delusions.

MR. REEVES: I object as to time frame and foundation, Your Honor.

[1166] **THE COURT:** All right.

MS. SHIFMAN: I'll back up.

THE COURT: Please lay that.

MS. SHIFMAN: Sure.

BY MS. SHIFMAN:

Q In 1999, you had a series of serious episodes that happened in your life. Right? You were having delusions?

A In 1999?

Q Yes.

A I don't know about delusions, but I was having some difficulties.

Q Okay. You were contemplating suicide at this time, you were very depressed?

A I was very depressed.

Q You were are abusing cocaine at that time?

A I think no. I think I was finished with cocaine in 1999.

Q You were abusing alcohol?

A Yes.

Q And you were involuntarily entered, admitted, into Kaiser Hospital in '99?

A Yeah. Yes.

Q Because, you were viewed as a harm to yourself.

A Yes.

Q And you remained there for eight days or so, before they released you.

* * *

[1187] **Q** Okay.

A The date is wrong.

Q Let's move to another time when you took a different amount of a drug that had been prescribed for you.

If you will, sir –

A What's that? Excuse me.

Q I want to focus your time around the time when your father passed away in November of 2004.

A Okay.

Q All right? It followed – your father's death followed a very long, difficult battle with cancer. Right?

A Yes.

Q You were very close to your dad?

A Yes.

Q You loved him dearly?

A Yes.

Q And it was very hard to watch him suffer as he did, I'm sure. Correct?

A Yes.

Q Once he passed away, in the time frame after that, you doubled or tripled your dose of Zoloft. Isn't that correct?

A That's correct.

Q You were feeling very, very depressed?

A Yes.

Q And, when you changed your dosage of Zoloft, that had a [1188] lot of tremendous side effects for you. Did it not?

A Apparently.

Q It made you very manic, right?

A Yes.

Q You started digging in the yard with your bare hands?

A Yeah.

MR. REEVES: Objection as to time frame and foundation. Your Honor.

THE COURT: Well, the time frame was shortly after the November death of his father, I guess, to sort of –

MS. SHIFMAN: Correct.

BY MS. SHIFMAN:

Q This continued into 2005, did it not, the digging?

A The digging was for a two-hour period. Period.

Q One time for two hours?

A One time, for two hours.

Q That's it. Do you remember when you were here in July, before the Judge (Indicating), when you testified under oath?

A Yes.

Q And you said that you went out into the yard, and you were digging day after day, until your hands were bloody?

A Ma'am, I – I know what I did. I dug in the yard for the wire, and I dug for two hours. And that was it. Until my wife got Dr. Woolery on the phone. I did it on one occasion.

Q When your wife got Dr. Woolery on the phone after you had

* * *

[1253] advice of counsel, he asked me to take the Fifth Amendment, and I did assert my Fifth-Amendment rights.

Q If I may read from Exhibit 658, the question was (As read):

> "QUESTION: What was the basis for your decision to purchase securities in United Surgical Partners?
>
> "ANSWER: I think I saw an article in *Forbes* magazine about this. That "

MR. REEVES: I object. That's not the complete answer.

THE COURT: That's not the complete answer?

MR. REEVES: The next line.

MS. SHIFMAN: Your Honor –

BY MS. MOEEL:

Q That statement was a lie, was it not, sir?

A That was not –

THE COURT: Hold on. Let me deal here.

The objection is overruled. You may ask your question.

BY MS. SHIFMAN:

Q That statement was a lie.

A No. No.

Q You bought USPI based on an article you saw in *Forbes*?

A Ms. Shifman, I was dealing with maybe 50-60 companies. I did see a couple of those companies in *Forbes* magazine. And I

* * *

[1299] **A** Yeah.

Q Yeah. Well, in fact, when you told the prosecutors about this supposed incident in the car –

A Yeah.

Q -- the first time you went in there, on March 15th, 2011, you said that Sam went in the car, and removed his battery from the cell phone (Indicating), and put it up on the dashboard (Indicating).

A That happened.

Q That happened.

A Absolutely.

Q And you didn't testify to that?

A Nobody asked me.

Q So you left out some of the information that happened during the conversation, supposedly, when you testified earlier.

A Nobody asked me about the minutiae.

Q You said that during the wedding weekend in July of '05, that, you know, you talked to Sam about a company called Celgene. Right?

A Yes.

Q That was based on your own research, right?

A Yes.

Q That you didn't tell Sam whether it was based on your research or it came from Maher, you just told him Celgene

* * *

[1304] **A** Correct.

Q So it's fair to say that there was no one at the helm from the time your dad got sick until he passed away. Right?

A Very true.

Q At the end, after your dad passed away, in late '04 and in '05, you were consumed with grief. Understandably so. Right?

A Yes.

Q Very depressed, right?

A Yes.

Q Having a number of psychological problems, mental health issues. Right?

A Yes.

Q Your focus wasn't really on your work, as well.

A True.

Q And, your focus, your obsession was really on researching and trading on a number of different companies and options, right?

A Yes.

Q And so in 2007 when you reached out to Maher, you weren't really running a thriving business at that time.

A True.

Q True. So, you – when you spoke to him, you begged him for information. Right?

A Brothers don't beg each other.

Q Fair. I'll give you that. You worked really hard for him [1305] to give you that information. Right?

A I – I asked him twice.

Q You asked him twice. He hesitated, did he not?

A Yes.

Q He didn't really want to do it, it didn't seem. Right?

A Yes.

Q But you pushed some of his buttons?

A Yes.

Q Told him you really needed it.

A Yes.

Q And the second it came out of his mouth, he instantly called you back and said "Don't trade on it." Right?

A Yes.

Q He begged you not to trade on it.

A Yes.

Q That was a time when brothers beg.

A Yes.

Q He didn't want you to do anything with that information.

A No.

Q And he asked you, "Don't do it." Right?

A Yes.

Q And you lied to him, and said, "Don't worry about it." Right?

A Yes.

Q And you traded on that, even though he didn't want you to.

[1306] **A** Yes.

MS. SHIFMAN: If I can have just a second, Your Honor.

THE COURT: Sure.

BY MS. SHIFMAN:

Q You traded with your best friend, Emile Jilwan, in addition to doing your own trading, right?

A Correct.

Q And, in essence, you and Emile were, I guess you would call it trading partners. Right?

A Yes.

Q And, you did it partially to help him out, right? Because he was your friend?

A No. We were actual trading partners.

Q Sure. But the reason that you gave him this information was to help him out because he was your friend.

A No, no. We were trading partners.

Q Let me try to reword that.

You could have traded on all this information on your own. Correct?

A Yes.

Q You didn't really need to get into a trading partnership with Emile Jilwan in order to trade.

A Yes.

Q Right?

* * *

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA,	)
Plaintiff,	) NO. CR 11-0625 EMC
vs.	) San Francisco, California
BASSAM YACOUB SALMAN,	) Tuesday
	) September 24, 2013
Defendant.	) 8:32 a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Ave.
San Francisco, California 94102
BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

the government's going to make?

A No.

Q So you don't know, now.

A No.

Q All right.

(Off-the-Record discussion between counsel)

MR. REEVES: Thank you, Your Honor.

THE COURT: Uh-huh.

BY MR. REEVES:

Q Now, I would like to back way up. I don't know how we got to this point without asking this question, but I'm going to ask it now.

Could you tell us, Mr. Kara, how you first became interested in your stock investing? How did you first get interested in the stock market?

A Dad gave me – Dad was dealing in stocks. And when Dad's condition became bad, he had a Charles Schwab account that contained about 10, 15 stocks in it. He handed it over to me. And he said, "This is yours." And, so, in it there were few biotechnology pharmaceutical stocks, and the rest were just basically Fortune 100 stocks. And then he said "I need to teach you a little bit about options, too."

And so, when we were doing the chemo sessions, we would sit for hours, and I would take a notebook pad and I would sit down and I would work out option tables, me and him. And [1381] that's how I learned it, from him.

Q And in what year is that beginning to happen?

A In the beginning of 2004.

Q Early 2004?

A In September.

Q Is that a – an important memory that you share of spending time with your father during his illness?

A Yes.

Q All right. And were you trying to honor and respect your father by learning from him in that context?

A Yes.

Q All right. Prior to that time, prior to 2004, did you have very much experience with the stock market?

A I've never traded.

Q Okay. So, you were asked a series of questions about how you were trading stocks in 1986. Do you remember that?

A I've never touched a stock in my life.

Q Okay. Now, I'm talking about questions that you got yesterday –

A Yeah.

Q – from – from counsel for the Defendant, about how you may have been trading stocks in 1986. Do you remember those questions?

A I was in graduate school in 1986.

Q Okay. But, do you remember yesterday, being asked about

* * *

[1391] **Q** You were asked about your conversations with your friend, Emile Jilwan. Do you recall that part of your cross-examination?

A Yeah.

Q And, in your conversations with your uncle, Zahi Haddad, do you recall that part of the cross examination?

A Yes.

Q Did you in fact disclose Maher as the source of your inside information to some people, but not to other people?

A Yes.

Q Okay. And, among the people that you disclosed the inside information to, did anyone ever insist on knowing the source of the information for any reason?

A Yes.

Q Okay. And is there any type of correlation between the people who insisted on knowing the source of the information, and the people to whom you did disclose the source of the information?

A Yes.

Q Would you please explain that.

A Usually, the people that insisted on knowing are the people that had a significant sum of money to invest. Bassam was not a small trader, by no means. He was a large trader. So as such, he wanted to know the source of the information to make sure that –

[1392] **MS. SHIFMAN:** Objection, Your Honor. Speculation.

THE COURT: Over –

MR. REEVES: I don't think so, Your Honor.

THE COURT: Overruled. Overruled. Go on.

THE WITNESS: So before he made those trades, he wanted to make sure and ensure the source of the information was appropriate, and that it wasn't coming from me, you know?

BY MR. REEVES:

Q And why would Bassam Salman, in his discussions with you, have wanted to know about the source of the information before he made a large investment?

MS. SHIFMAN: Calls for speculation, objection.

THE COURT: Overruled. He can testify as to his understanding.

THE WITNESS: He wanted to know how solid that information was because, you know, we were dealing with hundreds of thousands of dollars at stake.

BY MR. REEVES:

Q Were there other people besides Bassam Salman, who in any way wanted or insisted on knowing the source of the information?

A Same as Azar. Azar was purely a stock, stock investor. He transacted massive amounts of money in buying stock only. Not options. So, he would buy the actual stock, and so, the minimum investment from Azar was 200, $250,000 at a time, so

[1453] And, when I got involved, it was a matter of, you know, of drilling down, looking at the trading records of those parties, looking at their phone records, and trying to establish if there was a flow of information from Maher Kara ultimately to the – the party making the trade.

Q Why would a flow of information from an insider like Maher Kara at Citigroup to investors investing in the stock market be relevant to an insider trading investigation?

A Why would it be relevant?

Q (Nods head) Not all of us get to be FBI agents, so you're going to have to explain that, please.

A Um, not sure I understand your question, Mr. Reeves.

Q So, why – why is the flow of information, as you put it – what do you mean by that? Why does the flow of information from insiders at Citigroup to outside investors in the market, why is that relevant and something that you need to investigate in the course of your insider trading investigation?

A Well, it's all, you know, it's all about communication, really. And in this particular case, you got people living in different geographic locations around the country, is he focusing on that information,

specifically the phone records, was very relevant to my investigation.

Q All right. So, in this early period, through 2007 to in or around early 2008, was there a period of time when the FBI [1454] did not know about any possible involvement of Bassam Salman?

A Yes. That's right.

Q All right. And is that – whatever connection that he may have had to this, the trading in this matter, was that something that you were looking for connections for?

A Yeah, it was a big mystery to us initially, in that both Mr. Farnham and I were reviewing Michael Kara's trading records and reviewing Karim Bayyouk's trading records and we were seeing a lot of parallel trading activity, which suggested they were communicating. But from all the evidence we'd gathered at that point, there didn't appear to be direct communication between those two individuals, or any sort of family relationship.

Q So, did you pursue this matter further?

A We did.

Q What did you learn?

A I remember getting a call from Lloyd Farnham, basically saying, "Hey, Jeff, I've been reviewing the trade" –

MS. SHIFMAN: Objection, hearsay.

THE COURT: Sustained.

BY MR. REEVES:

Q All right. Did there come a point in time when you were alerted to the a possible connection by the SEC?

A Yes.

Q Thereafter, did you look at certain relevant telephone [1455] records?

A I do.

Q Do you remember that moment?

A I do remember that moment.

Q Please tell us what you remember figuring out about a possible connection between the Karas and Karim Bayyouk, involving Bassam Salman.

A I was alerted to a common phone number that appeared both on Michael Kara's phone records and on Karim Bayyouk's phone records. And from there, further investigation determined that that number belonged to Bassam Salman.

Q Up – and approximately when did that happen?

A It was early 2008.

Q Up to that moment, had the role of Bassam Salman been unknown to the FBI?

A Yes.

Q Did it take an active investigation in the way you have described to determine that Bassam Salman may have a role in this insider trading scheme?

A It did.

Q All right. Was that an important development in your investigation?

A It was a very significant development.

Q Why was that?

A Because it explained to us why Karim Bayyouk's trading [1456] appeared to mirror Michael Kara's.

Q All right. Good.

A And it gave us a complete picture of what we believed was the information flow from Maher Kara at Citigroup ultimately to Karim Bayyouk in Detroit.

Q Are you familiar with a person named Nasser Mardini?

A Yes, I am.

Q Did you know Mr. Mardini before he came and testified in this trial?

A I did.

Q Okay. Did you have an opportunity to meet with Mr. Mardini in the course of your investigation?

A Yes.

Q Okay. Do you know whether at some point, Mr. Mardini made a decision to cooperate with the FBI's investigation?

A He did make a decision at some point.

Q Was that decision by Mr. Mardini to come forward and cooperate an important development in the course of your investigation?

A Yes, it was.

Q In what way was it an important development?

A Up until the point that he decided to cooperate, all of the evidence that – that we had collected was – was substantially the business-record evidence.

All we had were documents from which we were able to draw

* * *

[1477] (Document displayed)

MR. REEVES: And if we could enlarge the top portion, yes, that graph portion of the document. We'll enlarge that. (Document enlarged)

MR. REEVES: And if we could highlight the columns underneath stocks and options, please, or just the column with stocks and then the column with options.

(Document highlighted)

MR. REEVES: Excellent. Thank you very much.

BY MR. REEVES:

Q All right. In this portion of the application to trade options in Mr. Salman's account, what type of disclosures are being made, Special Agent Chisholm?

A Disclosures relating to his investment experience.

Q And, what, what are Mr. Salman's answers about his investment experience relating to stocks as they appear here in the September 13, 2004 application?

A It's listed that he had been trading for four years. And that he makes 120 trades per year. That the size of those trades are about $7,000. And that he has good knowledge of trading in stocks.

Q All right. And, by comparison, does he make disclosures about his experience in trading in options?

A Yes.

Q Are those reflected in the second column to the right?

[1478] **A** Right.

Q And, what disclosures does Mr. Salman make about his experience through September, 2004, in the -- in trading in options?

A That he has not traded in options, but that he has good knowledge.

Q All right, good. If we could now go back to the – the other part of this page, below this.

(Document displayed)

MR. REEVES: And if you could enlarge the portion, the paragraph underneath "Risks of Option Trading." (Document enlarged)

MR. REEVES: Excellent. Thank you. All right.

BY MR. REEVES:

Q Is this – withdrawn.

Is this form signed by Mr. Salman?

A I believe it is.

Q All right. Then, could you please read this portion of the option application from Mr. Salman to Schwab?

A (As read)

> "The purchase or riding of option contracts involves a high degree of risk and is not suitable for all investors. By applying to add the opt on trading feature to your account, you represent that you: Understand the risks inherent in option trading; are

* * *

[1485] **Q** Okay. Whose – who has a brokerage account at Comerica?

A Karim Bayyouk.

Q And was the brokerage account at Comerica held in the name of Karim Bayyouk relevant to your investigation?

A Yes, it was.

Q Was it an important place for you to observe certain trading in this case?

A Yes.

Q Can you describe how and in what way?

A Yeah. A lot of the – a lot of the trades that we were investigating initially Biosite, USPI and Andrx, were being made not only in the accounts of Michael Kara and his – some of his family and friends here in the Bay area, but also in accounts held by Karim Bayyouk at Comerica. So, this was a heavy focus of my investigation.

Q All right. Now, we're going to get into the brokerage account in a little bit. But this (Indicating) is technically a separate bank account within Comerica Bank, in parallel to the brokerage account? Is that correct?

A That's right. This is for Comerica Bank. The brokerage account is with Comerica Securities, which is an affiliate of Comerica Bank. So it's technically two different legal entities, but they are related.

Q Related, in that they are all part of the Comerica family?

A That's right.

* * *

[1499] **Q** Coming into the Comerica Bank account, and then being transferred into the Comerica brokerage account?

A Yes.

Q All right. Well, let's take a look at one of those, please.

MR. REEVES: If we could pull up Exhibit 174 at Page 247, please.

(Document displayed)

MR. REEVES: And if we could just enlarge as much of the document as we could, front and back, that would be great. (Document enlarged)

MR. REEVES: That's great.

BY MR. REEVES:

Q So what is this, Special Agent Chisholm?

A This is a – one of the cashier's checks. It's a cashier's check that was issued by Charter One Bank. It's hard to read, but the remitter shown on the check is Karim Bayyouk. And, it's in the amount of $75,000.

And that check is being deposited into the Comerica checking account of Karim Bayyouk, on or about July 12, 2005.

Q And it's in the amount of 75,000?

A Correct.

Q And it's being countersigned on the back by Karim Bayyouk?

A Yes.

Q If you look at this check, just on the face of the check, [1500] are you able to identify any association between this check and the Defendant, Bassam Salman?

A No.

Q Over time, as a result of your investigation, did you develop evidence that indicated to you that there was an association between Bassam Salman and this check (Indicating)?

A Yes.

Q Okay. Will you describe generally the nature of that investigation, and how you were able to come to associate this cashier's check with the Defendant?

A In just following the money, from this point, I kind of worked backwards. I went to Charter One Bank where Karim Bayyouk, I learned, had additional accounts.

And what I observed was a wire in the amount of $75,000 coming into Karim Bayyouk's account from Bassam Salman, exactly one day before this cashier's check was issued.

Q Now, if you looked just at this check, you would not have known that. Is that correct?

A Correct.

Q All right. And, in this way, did the use of a cashier's check in the manner that it was used in this case, did that create any kind of additional effort on your part, in order to figure out where the money came from?

A Well, it requires an extra step. If it was a – you know, if it was a personal check from Karim Bayyouk from his Charter

* * *

[1505] **Q** Okay. All right. Good. Now, if we could go down and highlight the portion in the – the center column, associated with the Defendant Bassam Salman, in the amount of – parentheses, 300,000, close parentheses.

MR. REEVES: Maybe we could enlarge that, too, please. Just that.

(Document enlarged)

MR. REEVES: Okay.

BY MR. REEVES:

Q Is there a withdrawal, in a sense, on or around August 22, 2006, that you traced to the Defendant, Bassam Salman?

A Yes.

Q What did you determine about that withdrawal in the amount of approximately $300,000?

A I was able to trace it to the purchase of a house.

Q I would like to show – withdrawn.

So that, is that, the money is coming from the Karim Bayyouk brokerage account? And being used to obtain a home for whom?

A For Bassam Salman.

Q Okay. And parentheses around the number, what does that mean, as you use it in your chart?

A It's a negative number. It's money coming out of the account, in other words. So, a withdrawal of $305,000 that flows out of the brokerage account into the Comerica checking [1506] account.

Q I would like to show you what has been marked as Government Exhibit 174 at Page 63, please.

(Document displayed)

Q Do you recognize this document?

A Yes, I do.

Q What is this?

A This is the monthly account statement for the Comerica checking account held in Karim Bayyouk's name for the period of August 11, 2006, through September 13, 2006.

Q And, does it – is it relevant to the purchase by the Defendant of a new home?

A Yes, it is.

Q How is it relevant?

A If, if we perhaps go to the next page, there's the transaction information that I relied upon in order to trace that to the house purchase.

MR. REEVES: Let's go to the next page. Page 64 in the exhibit, please.

(Document displayed)

BY MR. REEVES:

Q And are the relevant portions to the acquisition by the Defendant of a new home highlighted here in this document?

A Yes, they are.

Q All right. And, just walk us through what is highlighted, [1507] please.

A Yeah. The top portion of the document represents deposits coming into the checking account. So,

on August 22, there is a deposit of 305,000 which, again, is coming straight from the trading account, the brokerage account at Comerica.

And, moving further down the page, on the same date there's a check that's issued. If you look at the check number, 1067, you see a check in the amount of $300,000 that's occurring on the same date.

Q Thank you very much. Let's go to Exhibit 174, Page 299, please.

(Document displayed)

MR. REEVES: If we could enlarge that?

BY MR. REEVES:

Q Do you recognize this check?

A Yes.

Q What is it?

A It's a copy of Check No. 1067, which is – it's a $300,000 check, from Karim Bayyouk to Bassam Salman.

Q Okay. That's the check you just talked about in the bank statement.

A Yes.

Q All right. Let's take a look at the next document – withdrawn.

Exhibit 178, this time, Page 85. Please.

[1508] **MR. REEVES:** If we could enlarge that and highlight the transaction in the middle of the three transactions. (Document enlarged)

MR. REEVES: In the bottom, the one for $300,000 deposit.

(Document highlighted)

BY MR. REEVES:

Q Special Agent Chisholm, what is Exhibit 178 at Page 85?

A This is a copy of a monthly account statement for an account held by Bassam Salman and Roula Salman, for the period August, 2006. And it reflects the $300,000 being deposited into this particular bank account.

Q All right. And then, let's go to Exhibit 184, please. Page 1.

(Document displayed)

Q And, do you recognize this document?

A I do.

Q What is this?

A The bottom portion – actually, the entire document was produced to the government by a title company that had a role in the real estate transaction associated with Mr. Salman's purchase of the house.

The bottom portion reflects the down payment for that purchase of $300,000, which comes from the same bank account that we just looked at.

[1509] **Q** Okay. That you traced back to the Comerica brokerage account belonging to Mr. Bayyouk.

A Correct.

Q That's the down payment for Mr. Salman's new home?

A Yes.

Q All right. Let's take a look at Page – Exhibit 184, Page 2, please.

(Document displayed)

MR. REEVES: And if we could enlarge the top part? (Document enlarged)

BY MR. REEVES:

Q And so, where is the location of the property that Mr. Salman buys with the $300,000 down payment?

A It's [Address redacted], Orland Park, Illinois.

Q And what is the approximate value of the home that he bought with the down payment of $300,000?

A The purchase price was 1.3 million.

Q 1.3 million?

A Yes.

Q Is that in suburban Chicago, to the best of your knowledge?

A Yes.

Q Thank you. I'm done with that.

I would like to go back to Exhibit 192 one last time, please.

* * *

[1520] **Q** And so, that is the meaning of no notation, as it appears in this column associated with Bassam Salman.

A Yes.

Q All right. And then, let's go to the last column on the far right. That's the column entitled "Kara Date of First Trade."

Do you see that?

A I do.

Q What is meant by that?

A Based on my review of Michael Kara's trading records for his accounts at Schwab, as well as the account records of Emile Jilwan, I went through and identified the instances in which he was investing in the same companies that Karim Bayyouk was investing in. And –

Q The –

A And the date upon which he was making that investment.

Q Okay. So, were you testing your investigative theory that if information was flowing from Maher Kara to Michael Kara, to others and eventually Karim Bayyouk, it would be reflected in the sequencing of the trades, in the first trades?

A That was part of it.

Q And what did you find?

A I found that in many instances, Michael Kara was placing a trade in a particular biostock – biotech company, and in or about that same period, but usually after, I observed trading [1521] in the same securities in the Karim Bayyouk accounts.

Q So, which would happen first? Mr. Kara, followed by Mr. Bayyouk?

A Yes.

Q Okay. And did that correlate to your premise that you were testing?

A Yes.

Q And the flow of information that you have described?

A Correct.

Q All right.

MR. REEVES: Let's – we are going to end at 2:00, is that correct, Your Honor?

THE COURT: Yes.

MR. REEVES: Just a couple last questions. I see I've got 53 seconds. Okay, good.

If we could come all the way out, and highlight in yellow the Salman column, please.

(Document highlighted)

MR. REEVES: Thank you very much.

BY MR. REEVES:

Q So, Special Agent Chisholm, what did you observe about whether Bassam Salman was trading in the same stocks as Karim Bayyouk in his own name in his own brokerage account, as a result of your efforts to put together Exhibit 87?

A Well, I observed Karim Bayyouk and Bassam Salman were [1522] trading in many of the same stocks. However, those were not the stocks that Michael Kara was trading in, with one exception.

Q There's one exception, Genentech. That's Line 14, correct?

A That's right.

Q But is there a mirror image in any sense between any of these investors?

A Yeah. I think it's – there's definitely parallel trading activity going on between Karim Bayyouk's accounts and Michael Kara's accounts.

Q Okay. And, for Michael Kara's trades, do you see any trades other than Genentech, for a Michael Kara stock, in Bassam Salman's own account?

A No.

Q Nothing there.

A No.

Q Okay.

MR. REEVES: Okay. Your Honor, at this time, that might be a good place for us to stop, please.

THE COURT: All right. We will adjourn for today and resume tomorrow morning at 8:30.

Again, a reminder that you are not to talk about this case with anyone, form any opinions or conduct any independent research. And keep an open mind until the case is submitted

* * *

Volume 7
Pages 1531-1726

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA,	)
Plaintiff,	) NO. CR 11-0625 EMC
vs.	) San Francisco, California
BASSAM YACOUB SALMAN,	) Wednesday
	) September 25, 2013
Defendant.	) 8:28 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Ave.
San Francisco, California 94102
BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

accomplish?

A It was really created to enable me to compare and contrast the trading activity that I observed in the Karim Bayyouk Comerica brokerage account with other trading activity that I observed in a brokerage account that Mr. Salman had at Charles Schwab, as well as Michael Kara's brokerage accounts.

Q All right.

MR. REEVES: If we could please highlight the columns for Mr. Bayyouk and Mr. Kara, and de-highlight Mr. Salman's column, please.

(Document highlighted)

BY MR. REEVES:

Q Now, do you recall in the course of this trial testimony, about mirror-image trading? Do you recall that?

A I do.

Q All right. As you analyzed the trading for Karim Bayyouk and Michael Kara, do you see any evidence that there may be mirror-images in the trading, as you analyzed it?

A Yes, I think that's a fair characterizatio. I see trading in the same companies, at or about the same time, in both of those accounts.

Q And that's in the account belonging to Karim Bayyouk, correct?

A Correct.

Q And, and in the account belonging to Michael Kara.

[1544] **A** Correct.

Q And do you observe a further sort of sequencing of trades happening at or around the same time, where one person is trading in advance of another?

A Yeah. Generally speaking, the trading that I observed occurs first in Michael Kara's brokerage account, and then shortly after, I see a similar trade in the Comerica brokerage account.

Q All right. And for approximately how many different securities do you see this type of data?

A About 20 different companies.

Q And are they the ones – so, as we analyze Exhibit 87, how do we come to that approximately 20

figure? Tell us how we would do that using this exhibit, please.

A Just looking at the two highlighted columns, wherever you see a date populated in one of those cells, that reflects essentially a common investment. And I think if you add up each row where there is a common investment, I think it totals about 20 different stocks of the 36 reflected on the summary.

Q Thirty-four?

A I'm sorry, 34.

Q Okay. And again, the 34 reflects a complete listing of Mr. Bayyouk's trading in this time period?

A Yes. It's every single company he trades in, during this approximate three-year period.

[1545] **Q** And, approximately 20 of those, according to your analysis, mirror-image, in a sense, as you have described it, the trading of Michael Kara.

A Yes.

Q All right. Okay, good.

Hold on one second.

(Off-the-Record discussion between counsel)

BY MR. REEVES:

Q A couple more questions on Exhibit 87. Let me draw your attention to No. 8, Bone Care.

MR. REEVES: Perhaps we could highlight that, that row, this time.

(Document highlighted)

MR. REEVES: Okay, good.

BY MR. REEVES:

Q What was the sequencing of trading that you saw in Bone Care International?

A Stock in Bone Care International is being acquired on the same day, in the respective brokerage accounts of Karim Bayyouk and Michael Kara.

Q And, in the account for Mr. Salman, did he acquire any stock in Bone Care at or around that time?

A He did not.

Q If we could go now to Andrx, be No. 23, please.

MR. REEVES: Highlight that.

* * *

[1547] **A** No, he doesn't.

Q And last, No. 33, Biosite.

MR. REEVES: If we could highlight that?

(Document highlighted)

MR. REEVES: Great.

BY MR. REEVES:

Q What, what trading did you observe in the records relating to Biosite in or around late March, 2007?

A Michael Kara is buying Biosite call options on March 22, 2007. The following day, Karim Bayyouk is also buying Biosite call options in his account.

Q And does Bassam Salman, in his own account, trade in Biosite at that time?

A He does not.

MR. REEVES: Thank you. I'm done with 87.

BY MR. REEVES:

Q I would like to show you what has been marked as Government Exhibit 500 for identification.

MR. REEVES: If I may approach, please?

THE COURT: Yes.

(Witness examines document)

BY MR. REEVES:

Q Do you recognize Exhibit 500?

A Yes, I do.

Q What is Exhibit 500?

* * *

[1567] **Q** All right, good. So Mr. Kara gets into Andrx on or about February 24, 2006. What happens next?

A Mr. Bayyouk is investing in Andrx on the same day.

Q And, what are they investing in?

A Calls. Call options and stock.

Q All right. And then, under the public announcement column, what happens in or around March 13, 2006?

A There's a public announcement that Wock- – that Andrx is being acquired.

Q And, when does Mr. Bayyouk sell?

A He begins selling in the April time frame. But he continues to hold onto some of his investment in Andrx, and finally sells out his position in January, on January 19, 2007

Q All right. So, doesn't sell all of it immediately, is that what you observed?

A Right. I believe there were call options that were ultimately exercised in which he acquired stock, which ultimately sold in January, 2007

Q All right. And, how much did Mr. Bayyouk profit from his trading in Andrx?

A The net profit was approximately $226,000.

Q All right. Let's go through Biosite, if we could. (Document highlighted)

Q Why don't you take us through your analysis of these

* * *

[1594] to the best of your understanding, does that correlate to the second count of the indictment?

A Yes.

Q All right. Would you please take us through the evidence supporting that charge as reflected in this record, please.

A Yes. Using the SEC settlement rule, on or about November 7, 2006, United Surgical Partners International call options are being purchased. In this particular instance, 58 contracts are being bought.

Q All right. Let's go to Page 171 – excuse me, Exhibit 171 at Page 349, please.

(Document displayed)

MR. REEVES: And if we could enlarge the top three trades.

(Document enlarged)

MR. REEVES: And, highlight the last one, please.

No, I'm sorry, we need to step back out. Highlight all four of those top four trades, please. Enlarge, yeah.

(Document enlarged)

MR. REEVES: And now, highlight the one for 6,200 as the quantity, please.

(Document highlighted)

MR. REEVES: Thank you very much.

BY MR. REEVES:

Q All right. I'm directing your attention to Exhibit 171, [1595] at Page 349. Are you familiar with this?

A Yes, I am.

Q What is this record?

A This is a portion of the monthly statement for the Comerica brokerage account belonging to Karim Bayyouk.

Q And does the highlighted trade correlate to Count 3 in the indictment, to the best of your knowledge?

MS. SHIFMAN: Objection to the form of the question, Your Honor. It's for the jury to decide whether it correlates to something that's charged.

THE COURT: Why don't you rephrase the question.

BY MR. REEVES:

Q Is this relevant to the securities fraud charges in the indictment, as you understand them?

A Yes.

Q All right. Could you please walk us through your understanding of this particular trade, as reflected in this portion of Exhibit 171?

A Yes. For this particular trade, stock is being purchased in the brokerage account, which would require the T+3 settlement rule to be applied.

So backing up from the settlement date of December 20, 2006, the trade date would be on or about the 15th of December, if I recall correctly, in that there's a weekend that occurs within this time frame.

[1596] **Q** You, too, remember days of the week.

A In certain instances, yes.

Q All right. And so the trade is happening, applying the three-day rule, on or about December 15, 2006, is that correct?

A Right.

Q And what is being acquired in USPI?

A This is 6,200 shares of USPI stock.

Q All right. Let me show you what has been received in evidence as Government's Exhibit 171, at Page 381. (Document displayed)

MR. REEVES: And if we could, please, in the middle section, right, right there, just that – those middle four trades, if you could enlarge those.

(Document enlarged)

MR. REEVES: And highlight the first one, please. (Document highlighted)

MR. REEVES: Thank you very much.

BY MR. REEVES:

Q To the best of your knowledge, is this one of the other charges in the indictment?

A Yes.

Q Okay. And, would you please explain the trading that occurs in Mr. Bayyouk's account pursuant to this particular entry in his records?

* * *

[1605] **THE COURT:** Yes.

BY MR. REEVES:

Q Do you have Exhibit 88 before you?

A Yes.

Q Is this the transcripts (sic) of statements made by Mr. Salman to the United States Securities and Exchange Commission, on or about October 9, 2008?

A Yes.

Q All right.

MR. REEVES: At this time, Your Honor, I propose that we read this into the Record.

And it's my proposal that I read the questions and anything extraneous occurring in the transcript, and that Special Agent Chisholm read the statements made by Bassam Salman.

MS. SHIFMAN: Your Honor, I object. First of all, to Exhibit 88, the Court's already ruled on that.

THE COURT: It's been admitted, right?

MR. REEVES: Yes.

MS. SHIFMAN: It's been admitted. Sorry.

THE COURT: Okay.

MS. SHIFMAN: It's been admitted. Secondly, I object to the proposed form. I don't believe it's proper. These are not questions from this prosecutor.

I think either Agent Chisholm should be testifying to [1606] what's in and reading what is in this transcript, or perhaps Ms. Lee can read the questions and Agent Chisholm can answer.

But, these are not questions being proffered by the prosecutor in this case.

THE COURT: Well, the purpose, I take it, is to simply get the question and answer read back to the jury, without attributing any significance as to who is reading it.

MR. REEVES: That is exactly right, Your Honor.

THE COURT: And without attributing any significance to the tone or anything else. This is simply an attempt to read the transcript back.

And I don't see any objection, so long as the jury understands that they are reading from a transcript, and you're not to infer anything from who's reading what, but you are to listen to the words and not the tone or anything else.

So, I'm going to overrule the objection.

MR. REEVES: Thank you, Your Honor.

(As read by Mr. Reeves and Special Agent Chisholm)

"UNITED STATES SECURITIES AND EXCHANGE COMMISSION, In the Matter of: UNITED SURGICAL PARTNERS,

Case No. SF-03247-A. WITNESS: Bassam Salman. PLACE: Securities and Exchange Commission, 175 West Jackson Boulevard, Suite 900, Chicago Illinois, 60604. DATE: Thursday, October 9, 2008."

(Document displayed)

[1607] "The above entitled matter came on for hearing pursuant to notice at 10:08 a.m. Appearances for the SEC, LLOYD FARNHAM, ESQUIRE. On behalf of the Witness, THOMAS M.

BREEN, ESQUIRE, Breen, Pugh & Associates, Chicago, Illinois.

"Page 4. PROCEEDINGS.

"MR. FARNHAM: We're on the record. It's eight minutes after 10:00 a.m. on October 9, 2008. Whereupon, BASSAM SALMAN was called as a witness, and having been first duly sworn, was examined and testified as follows:

"EXAMINATION BY MR. FARNHAM:

"QUESTION: Could you please state and spell your full name for the record.

"ANSWER: My – my first name is Bassam.

B-A-S-S-A-M. My last name is Salman, S-A-L-M-A-N.

"QUESTION: Do you have a middle name?

"ANSWER: I – I do have a middle name. It's Jacob.

"QUESTION: How do you spell that?

"ANSWER: Could be Jacob. Could either spell it with a Y or a J. Y-A-C-O-U-B or Jacob, so –

"QUESTION: Mr. Salman, what is your home address?

"ANSWER: [Address redacted] Orland Park, Illinois, 60467

* * *

[1618] "ANSWER: Oh, yeah.

"QUESTION: Is Karim Bayyouk also from Jordan?

"ANSWER: No. He's from Palestine.

"QUESTION: And was he born there?

"ANSWER: He was born there. So it could be Israel side. I think it's Palestine, though.

"QUESTION: Is your sister Sawsan married?

"ANSWER: Yes.

"QUESTION: Who's her husband?

"ANSWER: Maher.

"QUESTION: M-A-H-E-R?

"ANSWER: M-A-H-E-R.

"QUESTION: What is the last name?

"ANSWER: Kara, K-A-R-A.

"QUESTION: How long have they been married?

"ANSWER: Few years. I don't know exactly when they got married.

"QUESTION: Do you remember where they got married?

"ANSWER: In Chicago.

"QUESTION: Did you go to the wedding?

"ANSWER: Yes, I did.

"QUESTION: Had you met Maher Kara before that?

"ANSWER: Yes, I did.

"QUESTION: How long before that?

"ANSWER: Probably couple of years before they got [1619] married. And I don't know how long they have been married. It could be three years. I'm not sure, exactly. I don't know the exact date right now.

"QUESTION: I understand. Thank you for the clarification. Before we went off the Record, we were talking about Sawsan, I guess, is her name Sawsan Kara now?

"ANSWER: I think so. I don't know if she kept the last, the Salman name or not.

"QUESTION: Okay. And that's your sister. And you said that you met Maher Kara a couple of years before they got married.

"ANSWER: Correct.

"QUESTION: What does Maher Kara do for a living?

"ANSWER: He's an investment banker.

"QUESTION: Do you know who he works for?

"ANSWER: Who he works for now? At least someone's in this. I think it's Lehman, but I think they – they just recently filed and I don't know where, you know, that's the new company that acquired, so I can't tell you. But I know he was and used to work for Lehman until recently, so.

"QUESTION: Okay. Do you know how long he had worked for Lehman Brothers?

"ANSWER: No. I don't recall exactly. But I would [1620] say a couple of years.

"QUESTION: Do you know who he worked with – worked for before he worked for Lehman Brothers?

"ANSWER: He used to work with Citi, Citigroup or whatever it is, Citibank.

"QUESTION: And you know what he did for them?

"ANSWER: He's an investment banker.

"QUESTION: What does, what does that involve? What's your understanding of what an investment banker does?

"ANSWER: I really don't know the exact, or what his duties or his, you know, what exactly, how he does, what he does, his job.

"QUESTION: Do you know what industry he was working in at Citigroup?

"ANSWER: In the Citigroup? He is, I think, in the biotech.

"QUESTION: And how do you know that?

"ANSWER: How do I know?

"QUESTION: Is it from, did you, do you know that from conversations you had with Maher Kara?

"ANSWER: I know he worked for the, with an investment banker with, you know, biotech division. That's probably from – from whatever, I

mean, I just, that's what, I know he worked with Citigroup, [1621] so it's got to be, you know, through our normal conversation.

"QUESTION: Did you, it could also be conversations with your sister. Did you have conversations with her about it?

"ANSWER: That's the job, I mean, you know and when he came to get married, you know, you ask somebody what you do in a normal conversation. You know, when they first met, or whatever, what you do, what you work, whatever it is. Just came out, I don't recall when, who, where, what about, when about, but that's what I recall.

"QUESTION: Do you know where he worked before he worked at Citigroup?

"ANSWER: I have no idea.

"QUESTION: Had he been working at Citigroup, I guess, when you met him, was he working at Citigroup?

"ANSWER: From what I recall, he was.

"QUESTION: You don't have a recollection of being, him being somewhere else?

"ANSWER: I have no recollection of that. I had said that just I don't remember, to be honest with you.

"QUESTION: So as far as you know, for as long as you've known him, he's either worked at Citigroup or Lehman Brothers?

[1622] "ANSWER: That's what, from what I recall.

"QUESTION: What does your sister, Sawsan, do for a living?

"ANSWER: She's a pediatrician. She's a doctor. She's a housewife now. Just had a new baby.

"QUESTION: Where did she receive her medical training?

"ANSWER: At University of Chicago.

"QUESTION: When did she finish?

"ANSWER: Before she got married. I don't know, I was, I have no, I don't have the exact date. Could be –

"QUESTION: Approximate is fine.

"ANSWER: Approximate could be three years, two and a half years, four years. I don't know. I know she finished, she finished probably before she got married, that's what I'm –

"QUESTION: Before, well, let me ask this. When your sister and Maher Kara got married, where were they living or where did they live after that?

"ANSWER: The question again, please?

"QUESTION: When your sister and Maher Kara got married, where did they live at that time?

"ANSWER: After they got married?

"QUESTION: Yes.

[1623] "ANSWER: They lived in New York.

"QUESTION: And you mentioned that, well, do they now live in San Francisco Bay area?

"ANSWER: No. They live in San Francisco.

"QUESTION: When did they move there?

"ANSWER: I think when his – he got a new job with – with Lehman, so it's been – could be a year and a half, two years. I don't recall.

"QUESTION: And do you know someone named Michael Kara?

"ANSWER: Yes, I do.

"QUESTION: Who is he?

"ANSWER: That's Maher's brother.

"QUESTION: Do you know him by Michael or Mounir?

"ANSWER: I, both.

"QUESTION: Earlier you mentioned something called a 2327 Building Account. Do you recall that?

"ANSWER: I do.

"QUESTION: Can you tell me what that, what that account is?

"ANSWER: It's a checking account that we put money in accounts from rents or line of credits that we have info (sic).

"QUESTION: And when you say we, who do you mean?

"ANSWER: It's a, it's a checking account that we put [1624] the money into. It's in my name and my brother name.

"QUESTION: Is that for some of your property and development work?

"ANSWER: We do it for, I use it for various, you know, ventures and businesses, pay taxes, property tax, repairs.

"QUESTION: Is it connected to any of the business entities that you use to own property?

"ANSWER: No, it's just a checking. It's not a corporation, just a checking account.

"QUESTION: What does the name 2327 Building Account mean?

"ANSWER: We used to have a building, we have a building that's address is 2327, and now – that's how it came about.

"QUESTION: Okay, but now the account is used for other things also?

"ANSWER: Yeah, it, yeah, it was never was used for a particular building or a particular venture, that's all."

BY MR. REEVES:

Q Two more details that I would like to cover with you, Special Agent Chisholm.

A Okay.

Q Yesterday, there was testimony about – in your money flow

* * *

[1656] **Q** Do you recall Mr. Jilwan producing some type of ledger reflecting his trading, joint trading with Michael Kara?

A I do.

Q All right. Do you recall when Michael Kara began his cooperation, him discussing in substance Emile Jilwan?

A Yes.

Q And, in substance, without going into the details, is it fair to say he insisted – he, Michael Kara, insisted that he never told Emile Jilwan that Maher Kara was the source of the information?

A Right.

Q By contrast, when Michael Kara began his cooperation, did he insist that he did disclose Maher Kara as the source of information to other persons?

A Yes.

Q And who did those other persons include?

A Bassam Salman, Joseph Azar, and Nasser Mardini.

Q Have you analyzed the – the proportion of the investments being made by some of the people involved in, for example, Biosite, in the amount of money that they are betting, so to speak, on Biosite, in the relevant period of the securities trading?

A I've done some of that analysis.

Q And do you see any type of disproportion between what some of the other players are investing, as versus people like

* * *

Volume 8
Pages 1727-1928

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE EDWARD M. CHEN, JUDGE

UNITED STATES OF AMERICA,	)
Plaintiff,	) NO. CR 11-0625 EMC
vs.	) San Francisco, California
BASSAM YACOUB SALMAN,	) Friday
	) September 27, 2013
Defendant.	) 8:25 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: MELINDA L. HAAG
United States Attorney
450 Golden Gate Ave.
San Francisco, California 94102
BY: ADAM A. REEVES
KATHERINE BURKE DOWLING
Assistant United States Attorneys

For Defendant: SHIFMAN GROUP
601 California Street
Suite 1800
San Francisco, California 94108

BY: GAIL R. SHIFMAN, ESQ.
and
MOEEL LAW OFFICE
214 Duboce Avenue
San Francisco, California 94108
BY: SHAFFY MOEEL, ESQ.

Also Present: SPECIAL AGENT
JEFFREY CHISHOLM

* * *

A In our culture, when you get to know somebody it's with the intention of marriage, not for spending years together without marriage. And so, yes. I think when we both entered into the relationship, it did progress, since there was a connection.

Q Okay. And, when was the first time that your brother, Sam, got to meet Maher, if you recall?

A Maher came out – the first time that I actually met him was the same time that my family met him. It was a few days before my birthday of that year. So, in late April, 2002.

Q And, did there come a time when – when you recall Sam coming to visit Maher's family in California?

A Yes.

Q And when was that?

A That was shortly before Memorial Day of May, 2002. And we all went as a family to visit and get to know his family.

Q Okay. And so tell us who traveled with you, if you – I assume you were there.

A Yes.

Q Okay. Who traveled with you?

A It was myself, Sam, my older brother Ghazy, my sister-in-law Roula. And if I'm recalling correctly, my mother.

Q All right. And where was it that you stayed in California?

[1748] **A** We stayed at the Holiday Inn in Vallejo.

Q And do you remember when you arrived and when you left, by any chance? Or how long you were here in California?

A We were here for approximately three days.

Q Okay. And during that trip, how much time do you think you spent – your family, including Sam – spent with Mounir Kara?

A I recall one specific event, I believe they invited us over for lunch at their home. And there was another time when we all were invited to a restaurant in Napa Valley.

But beyond that, I don't know of any other specific – most of the time we did spend at his parents' home, because the purpose of this the visit was for our family to get to feel comfortable, and know and see whether his family, especially the parents, mom and dad, were a good fit with our family. Because we often viewed that – family holds the same moral values, that ideally it would be a reflection of how Maher would be.

Q So on two occasions, Mounir was present at some of these group events over the three days?

A Yes.

Q And, the next time, if you recall, that Sam got a chance, if you remember, to spend time with Maher's family was when?

A It would have been the following year, at our engagement, in June, 2003.

* * *

[1754] have gotten to see Mounir Kara was when?

A At the wedding.

Q At the wedding?

A Prior to the wedding.

Q All right. And do you recall the dates of the wedding festivities?

A Yes.

Q And they are what dates?

A Of the actual wedding day? Or around that time period?

Q Yes.

A It was July 7, 8 and 9.

Q What year?

A 2005.

Q Thank you. And, at the – at the time of the wedding, had you had any specific discussion with Sam Salman about the nature or extent of Mounir Kara's mental illness?

A No.

MS. SHIFMAN: If I may approach, Your Honor, with some exhibits?

THE COURT: Okay.

BY MS. SHIFMAN:

Q And I have approached, Dr. Kara, with what's been marked as Defendant's Exhibits 601 through 612.

And if you could take a minute to sort of go through those – they're photographs. Go through those photographs and see

* * *

summaries and determine the facts from the underlying evidence.

Charts and summaries in evidence.

Certain charts and summaries have been admitted in evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Count 1, conspiracy, elements.

The Defendant is charged in Count 1 of the indictment with conspiring to commit securities fraud in violation of Section 371 of Title 18 of the United States Code. In order for the Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about 2004, and ending on or about 2007, there was an agreement between two or more persons to commit at least one crime as charged in the indictment;

Second, the Defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act between 2004 and 2007 for the purpose of carrying out the conspiracy,

with all of you agreeing on a particular overt act that you find was committed.

[1788] A conspiracy is a kind of criminal partnership – an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy, with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not

become a conspirator merely by associating with one or more persons who [1789] are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The Government is not required to prove that the Defendant personally did one of the overt acts.

Conspiracy – knowledge of and association with other conspirators.

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities or locations of all the other members.

Even though a defendant did not directly conspire with other conspirators in the overall scheme, the Defendant has, in effect, agreed to participate in the conspiracy if the Government proves each of the following beyond a reasonable doubt that:

1, the Defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy;

2. The Defendant knew or had reason to know that other conspirators were involved with those with whom the Defendant [1790] directly conspired; and

3. The Defendant had reason to believe that whatever benefits the Defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for a short period of time.

Count 2 – Counts 2 through 5, securities fraud – elements.

The Defendant is charged in Counts 2 through 5 of the indictment with securities fraud in violation of federal securities law.

1. Count 2 charges the Defendant with securities fraud concerning the purchase of 58 securities of United Surgical Partners International, Inc. on or about November 7, 2006.

2. Count 3 charges the Defendant with securities fraud concerning the purchase of 6,200 securities of United Surgical Partners International, Inc., on or about December 15, 2006.

3. Count 4 charges the Defendant with securities fraud concerning the purchase of 37 securities of Biosite, Incorporated on or about March 23, 2007

4. Count 5 charges the Defendant with securities fraud concerning the purchase of 22 securities of Biosite, Incorporated on or about March 23, 2007

As to each count you are considering, in order for Mr. Salman to be found guilty of this charge, the

Government [1791] must prove each of the following elements beyond a reasonable doubt:

First, the Defendant willfully used a device or scheme to defraud someone or engaged in any act, practice, or course of business that operates or would operate as fraud or deceit upon any person;

Second, the Defendant's acts were undertaken in connection with the purchase of securities, specifically:

1. For Count 2, that the Defendant's acts were undertaken in connection with the purchase of 58 securities of United Surgical Partners International, Inc. on or about November 7, 2006.

2. For Count 3, that the Defendant's acts were undertaken in connection with the purchase of 620 securities in United Surgical Partners International, Inc. on or about December 15. 2006.

And 3, Count 4, the Defendant's acts were undertaken in connection with the purchase of 37 securities of Biosite, Incorporated on or about March 23, 2007.

4. For Count 5, that the Defendant's acts were undertaken in connection with the purchase of 22 securities of Biosite, Incorporated on or about March 23, 2007.

Third, the Defendant directly or indirectly used an instrumentality of interstate commerce or any facility of any national securities exchange in connection with these acts; [1792] and

Fourth, the Defendant acted knowingly.

"Willfully" means intentionally undertaking an act for the wrongful purpose of defrauding or deceiving someone. Acting willfully does not require that the Defendant know that the conduct was unlawful. You may consider evidence of the Defendant's words, acts, omissions – or omissions, along with all the other evidence, in deciding whether the Defendant acted willfully.

An act is done knowingly if the Defendant is aware of the act, and did not act through ignorance, mistake or accident. The Government is not required to prove that the Defendant knew that his acts were unlawful. You may consider evidence of the Defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the Defendant acted knowingly.

It is not necessary that the Defendant made a profit or that anyone actually suffered a loss.

Counts 2 through 5, "device or scheme to defraud" defined. A "device or scheme to defraud" is merely a plan for the accomplishment of any fraudulent objective.

"Fraud" is a general term that embraces all efforts and means that individuals devise to take advantage of others.

The specific "device or scheme to defraud" or "act, practice, or course of business" that the Government

alleges [1793] that the Defendant employed in connection with Counts 2 through 5 of the indictment is known as "insider trading."

An "insider" is one who comes into possession of material, confidential, non-public information about a security by virtue of a relationship that involves trust and confidence. If a person has such "inside information" and his position of trust or confidence prevents him from disclosing that information, the law forbids him from buying or selling the securities in question or giving that information to others so that they can trade in such securities on the basis of that information.

The law also prohibits a person who's not actually an insider from trading in securities based on material, nonpublic information, if the person knows that the material, nonpublic information was intended to be kept confidential and knows that the information was disclosed in breach of a duty of trust or confidence and knows that the insider personally benefited in some way, directly or indirectly, from the disclosure of the allegedly inside information.

Counts 2 through 5 allege that the Defendant engaged in insider trading as a "tippee." That is, based on the allegations that the Defendant received material non-public information and wrongfully used it for his own benefit, when he knew that the information had been disclosed in violation of a duty of trust and confidence.

[1794] A person who receives material, non-public information engages in an act of fraud or deceit under the Federal securities laws if he buys or sells securities based on material, nonpublic information that he knows was disclosed by another person in breach after duty of trust and confidence, and knows that the insider personally benefited in some way, directly or indirectly, from the disclosure of the allegedly inside information. I caution you, however, that trading on information that does not originate from an insider is not illegal.

In order to find that the Government has established the first element of securities fraud – namely that the Defendant used a device or scheme to defraud or engage in any act, practice, or course of business that operates or would operate as fraud or deceit upon any person – the Government must prove each of the following beyond a reasonable doubt as to each count:

1. That Maher Kara, who the indictment alleges was an "insider" or the "tipper" had a fiduciary duty or other relationship of trust and confidence with Citigroup or Citigroup's clients;

2. That Maher Kara intentionally breached that duty of trust and confidence by disclosing confidential, material, non-public information to Mounir "Michael" Kara, which information was subsequently disclosed to the Defendant;

[1795] 3. That Maher Kara personally benefited in some way, directly or indirectly, from the disclosure

of the confidential material, non-public information to Mounir "Michael" Kara;

4. That the Defendant knew that the information he obtained had been disclosed in breach of a duty;

5. That the Defendant used the material, non-public information he received to purchase or sell a security or tip for his own benefit; and

6. That the Defendant knew that Maher Kara personally benefited in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounir "Michael" Kara.

Knowledge of the breach by tipper.

As to the Defendant's knowledge that the insider has breached the insider's duty of trust and confidentiality in return for some actual or anticipated benefit, it is not necessary that the Defendant know the specific confidentiality rules of a given company or the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that the Defendant had a general understanding that the insider was improperly disclosing inside information for personal benefit.

Counts 2 through 5, deliberate ignorance.

You may find that the Defendant acted knowingly if you [1796] find beyond a reasonable doubt that the Defendant:

1. Was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and

2. Deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the Defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the Defendant was simply careless or reckless.

"Material, non-public information" defined.

Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to purchase or sell securities.

Non-public information is information which is not generally available to the public through such sources as press releases, trade publications, analyst reports, newspapers, magazines, television, radio, websites, Internet chatrooms, online message boards or other publicly available sources.

Information is considered non-public for purposes of insider trading until such information has been effectively disseminated in a manner sufficient to insure its availability to the investing public.

[1797] Counts 2 through 5, "Benefit" defined.

Personal benefit includes not only monetary gain, such as a cut of the take or a gratuity from the tippee, but also a reputational benefit or the benefit one

would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature; it could include, for example, maintaining a useful networking contact, improving the tipper's reputation, obtaining future financial benefits, or making a gift of confidential information to a trading relative or friend.

"Use of inside information" defined.

A person uses material, nonpublic information in connection with a securities purchase if that information is a substantial factor in his decision to purchase the security.

"In connection with," defined.

"In connection with" means that there was some nexus or relationship between the allegedly fraudulent conduct and the purchase of the securities.

"Instrumentality of interstate commerce" defined.

An instrumentality of interstate commerce includes the postal mails, e-mails, telephone, telegraph, telefax, interstate highway system, Internet or similar methods of communication and travel from one state to another within the United States.

[1798] Aiding and abetting. A defendant may be found guilty of securities fraud, even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To

prove a defendant guilty of aiding and abetting, the Government must prove beyond a reasonable doubt:

First, securities fraud was committed by someone;

Second, the Defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of securities fraud; and

Third, the Defendant acted before the crime was completed.

It is not enough that the Defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the Defendant acted with the knowledge and intention of helping that person commit securities fraud.

The Government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

All right. So, at this point, the next stage will be the presentation of closing arguments by the parties. But, we are now past 10:00 so we will go ahead and take a break, 15-minute break, and then resume with the Government's closing argument.

[1799] So, we'll see you in 15 minutes.

THE CLERK: All rise for the jury.

(Jury excused)

(The following proceedings were held outside of the presence of the Jury)

MS. SHIFMAN: Just very quickly, just to preserve the Record, we just move at the conclusion of the defense case again to dismiss the charges, to preserve the Record.

THE COURT: All right. So noted.

MR. REEVES: And one little thing, I think, Your Honor, when you read Jury Instruction No. 29, in the last sentence of the first paragraph, this is special circumstances, I heard the Court insert a "not" where there isn't a "not" there.

THE COURT: Oh, okay.

MS. SHIFMAN: I heard it as well.

THE COURT: Okay.

MR. REEVES: And the remedy might be simply rereading that sentence.

THE COURT: Yeah. I figured out of those 4,000 words, I probably screwed up somewhere. But I will correct that.

MR. REEVES: Okay. Thank you, Your Honor.

THE COURT: Thank you.

(Recess taken from 10:10 to 10:23 a.m.)

* * *

[1806] [CLOSING ARGUMENT/DOWLING]

later on that week. We're not that far from that Monday when he learned about it. On the 22nd he calls his brother. His brother wants some information.

He had already given his brother information on USPI, don't forget. That was before. He had already given up the ghostGovernment with USPI, said he knew, when he gave information to his brother on USPI, that his brother was going to trade on it. And trade on it, he did.

Move forward to Biosite. He gives him more information. He told you that. He sat on that stand and he told you. He was conflicted about it. He had a complicated relationship with his brother, clearly, but they loved one another. You saw that, you saw that in the wedding video. They loved one another.

He asked him for information, and he gave it. And you know what? He told you this: He knew his brother was going to trade on it. And his brother traded on it.

And you know what else his brother did? His brother called the three people that he told you in this courtroom he told over that three-year time period, 2004 to 2007, he told three people about the source of the information (Indicating). Maher. Three people he told.

Who did he tell? You probably remember. One of them is right here in the courtroom (Indicating), Bassam Salman. He told Bassam Salman that the information that he had, that

* * *

[1820] thing. That's how options are traded on national securities exchanges.

And the fourth element, that Defendant acted knowingly; that this wasn't a mistake, it wasn't an accident; that he acted knowingly.

And the Government is not required to prove that the Defendant knew that this was illegal, just that he acted knowingly. And "knowingly" includes turning a blind eye.

Let's turn back to the first element and look at the first three of the six subparts to this element.

(Document displayed)

First, that Maher Kara, "insider," had a fiduciary duty with Citigroup. This isn't in contention. Maher Kara was on the stand. He told you about those fiduciary duties. We looked through the code of conduct. We looked through the manuals. He had a fiduciary duty. That was clear. And he told you that he violated that fiduciary duty.

Second, that Maher Kara intentionally breached that duty by disclosing material, nonpublic information to Michael Kara, which information was

subsequently disclosed to the Defendant. That's not in dispute either.

THE COURT: You might want to turn that mic towards you.

(Request complied with by Counsel)

THE COURT: Thank you.

[1821] **MS. DOWLING:** Maher testified to the fact that he provided material, non-public information. He testified to that fact, he provided it to his brother. And that same information was given by Michael to the Defendant, Bassam Salman.

Third element, that Maher Kara personally benefited in some way, directly or indirectly, from the disclosure of the confidential information to Michael Kara.

Again, they are brothers. You saw their relationship, saw the toast at the wedding. This was for mutual benefit. And Maher Kara told you that, told you that he benefited, told you that his brother benefited.

Let's turn now to Elements 4, 5, and 6. I'm going to start with No. 6.

(Document displayed)

MS. DOWLING: That the Defendant knew that Maher Kara personally benefited in some way, directly or indirectly, from the disclosure of the inside information to Michael Kara.

Again, it was no secret that Maher and Michael were brothers. The Defendant knew that, Defendant knew the relationship. And as the Judge instructed you, giving the gift of information to a trading relative, that's part of the equation.

Let's look at No. 4, that the Defendant knew that the information he obtained had been disclosed in breach of a

* * *

No. 15-628

In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

JOHN D. CLINE
LAW OFFICE OF JOHN D. CLINE
235 Montgomery Street
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

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INTRODUCTION

This case calls upon the Court—as it has done repeatedly in recent years—to impose clear limits on a federal crime that rests on indeterminate statutory language. The Court has used several interpretive tools to cabin elastic federal crimes, including careful reading of the statutory text, strict enforcement of the prohibition on common-law crimes, and application of the rule of lenity and the doctrine of constitutional avoidance. These interpretive tools rest on two main constitutional foundations: the separation-of-powers principle that it is for Congress, and not the courts, to enact federal criminal laws, and the due process prohibition on vague criminal statutes. The judge-made crime of "insider trading" implicates both of these constitutional principles.

Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security, but is silent on "insider trading." This Court has repeatedly held that merely trading securities based on material nonpublic information is neither "deceptive" nor "manipulative," and that §10(b) therefore imposes no general duty to refrain from trading on inside information. The Court has, however, found in §10(b) certain limited situations in which a corporate insider's trading, as well as "tipping" and trading by a "tippee" of a corporate insider, can violate the statute. In *Dirks v. SEC*, 463 U.S. 646 (1983), the Court held that tippees may freely trade on material nonpublic information unless that information came

from an insider who breached his fiduciary duty to the company's shareholders by disclosing it for "personal gain," and the tippee knows these facts. This personal benefit requirement is the line demarcating when tippee trading on material nonpublic information is legal, and when it is fraud that violates §10(b). Importantly, the focus in ascertaining whether the government has proved the requisite benefit is on the tipper's motive.

Petitioner Bassam Salman was convicted of securities fraud offenses on the theory that he engaged in criminal insider trading. Salman was not a corporate insider, nor was he "tipped" by an insider. He was a "remote tippee"; he traded on inside information that he learned third-hand from a member of his extended family, Mounir "Michael" Kara, who in turn received it from his brother Maher, a Citigroup banker. Under this Court's precedents, Salman was free to trade on the information unless the original tipper, Maher, shared the information with his brother Michael in exchange for a "personal benefit."

It was undisputed that Michael neither paid Maher nor provided him with anything of value for the information. There was no tangible exchange and, if anything, the conversations were detrimental, not beneficial, to Maher, because they made him anxious and upset. Maher did not want Michael to trade on the information or to share it with anyone else, in one case even provoking Michael to swear "on his daughter's life that he wasn't trading." The government charged only one instance in which Maher even suspected that Michael was trading.

The question in this case is what counts as a personal benefit. Must the benefit represent a concrete, tangible pecuniary gain to the tipper, or is the intangible, emotional "benefit" that one might receive by providing a "gift" of inside information to get a bullying "friend" or "relative" "off one's back" enough, as the Ninth Circuit held?

The answer is that the Court's insider trading cases, like its other fraud precedents, require a showing of pecuniary gain. This narrow definition of personal benefit is necessary to avoid the serious due process and separation-of-powers problems that a broader rule would create. In the three decades since *Dirks*, the government has taken an increasingly expansive view of what might qualify as a "personal benefit." It has filed charges in many cases where the insider received no tangible benefit whatsoever; instead, the alleged "benefit" was social or interpersonal in nature, in that the tippee was the insider's casual acquaintance or relative. Yet most, if not all, insiders have this kind of relationship with their alleged tippees. If such minimal ties to the tippee satisfied the personal benefit requirement, this Court's restrictions on insider trading liability would be meaningless. An insider who tips will *always* have some emotional reaction to his disclosure. Which emotions are beneficial to the insider, and which are not? How is a remote tippee supposed to know the difference?

The Ninth Circuit's indeterminate psychological benefit "standard" provides so much flexibility that it would effectively allow the government to usurp Congress' role to define the

crime. If endorsed, the Ninth Circuit's approach would eliminate the personal benefit requirement, and replace it with precisely the broad prohibition on insider trading that this Court has repeatedly rejected. The Court should instead adopt the only clear and definite personal benefit standard that will enable market participants to discern when they can legally trade, and when they cannot: pecuniary gain to the insider.

OPINIONS BELOW

The relevant opinion of the Ninth Circuit is reported at 792 F.3d 1087. The Ninth Circuit issued an additional opinion that is unpublished, *see* 618 Fed. App'x 886, and the opinion of the U.S. District Court for the Northern District of California is at 2013 WL 6655176.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The court of appeals had jurisdiction under 28 U.S.C. §1291. The Ninth Circuit entered judgment on July 6, 2015. A petition for rehearing was denied on August 13, 2015. The petition for writ of certiorari was filed on November 10, 2015 and granted on January 19, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Relevant constitutional, statutory and regulatory provisions are reprinted in the Statutory Appendix to this brief.

STATEMENT OF THE CASE

This case directly illustrates how the government's expansive reading of §10(b) has gutted the personal benefit requirement. Michael neither paid Maher nor provided him with anything of value for the information. If anything, Michael bullied Maher into leaking the information; the exchanges caused Maher serious anxiety, and he only capitulated to get Michael "off his back." Indeed, the district court reduced Maher's Sentencing Guidelines offense level because Maher "did not benefit, did not engage in this conduct for self-benefit, [and] did not gain anything."[1] Similarly, the SEC concluded that the fact that Maher "received no financial benefit" was a "mitigating circumstance[]" weighing in favor of a temporary, rather than permanent, bar from the securities industry.[2] If a benefit can be divined from these facts, there is no case in which one will not be present, and few cases

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[1] Tr. of Proceedings at 9, *United States v. Kara*, No. 09-cr-00417-EMC-1 (N.D. Cal. Dec. 19, 2014); *id.* at 20 (gain in presentence report "overstate[d]" Maher's "culpability...since he did not engage in trades for personal gain and gained nothing from this in terms of any monetary enrichment").

[2] *Kara*, Initial Decision Release No. 979, 2016 WL 1019197, at *6-7 (ALJ Mar. 15, 2016), *noticed as final decision*, Exchange Act Release No. 77731, 2016 WL 1660190 (Apr. 27, 2016).

in which even remote tippees who had no involvement in or knowledge of the facts underlying the disclosure could avoid criminal liability. Salman had nothing to do with Michael's efforts to obtain the information, knew nothing about the circumstances of Maher's disclosures, and did not know what benefit, if any, Maher might have received.

Nevertheless, the government maintained that Salman violated §10(b) because Maher benefited by disclosing the information as a "gift" to his brother Michael. JA.404-05. Under this theory, Salman was convicted of "insider trading" and conspiracy to commit insider trading, and sentenced to three years' imprisonment.

A. Trial

In September 2011, in the U.S. District Court for the Northern District of California, Salman was charged with four substantive counts of insider trading and one count of conspiracy to engage in insider trading. JA.20-33. Salman was tried in September 2013. Michael and Maher testified for the prosecution under cooperation agreements.

Viewed in the light most favorable to the government, the evidence established that Maher often shared information with Michael in confidence to get advice about work or blow off steam. But the two brothers had a complicated relationship that often taxed Maher. Michael betrayed Maher's trust and persistently pressured him for more information. Maher never disclosed information to Michael for anything of value or as part of a *quid pro*

quo; all Maher ever sought to obtain was the scant comfort of getting Michael to stop pestering him. Maher also had no idea that his brother was relaying information to Salman or anyone else.

Michael testified that he told Salman that at least some of his information came from Maher. But there was no evidence that Michael told Salman how he got the information from Maher, and nothing to suggest to Salman that Michael had bribed Maher or provided him with anything of value for the information.

1. *Michael and Maher.* Michael and Maher were born in Lebanon and emigrated to the United States with their parents in 1976. JA.59. The family settled in the San Francisco Bay Area. *Id.* Michael was eleven years older than Maher, and very protective of his younger brother. JA.195, 215-16. Michael was highly intelligent. He graduated from college at age 20 with a degree in biochemistry and studied toxicology in a graduate program for three years. JA.170, 211-12. But Michael struggled with mental illness for decades and had bouts of substance abuse. *E.g.*, JA.68, 139-43, 148-49, 213-14, 324-28.

Maher excelled in school and business. JA.132, 321-22. He graduated from the University of California at Berkeley in 1993, passed the CPA exam, and went to work for Coopers & Lybrand in New York. JA.63-64. Maher testified that one reason he left the Bay Area was to escape his brother and "the stress that [he] had put on [their] family." JA.65. Maher later attended business school in

Chicago, earned his MBA, and began working at Citigroup as an investment banker in 1998. JA.65-66. Four years later, Maher joined Citigroup's healthcare group as a vice president. JA.67 In that role, Maher advised biotechnology and pharmaceutical companies on mergers, acquisitions and financing strategies. JA.69-70. Maher was in the healthcare group from 2002 to 2007 and became a director during that period. JA.68, 92. He was based mostly in New York. JA.67

Michael remained in California, where he operated a hazardous waste business. JA.212-13, 294. In 2004, Michael took over his father's Charles Schwab account and started actively trading securities, including stock options. JA.221-22, 336-38. He performed his own research and by 2006 was researching 50-60 companies at a time. JA.329; *see* JA.288-89, 330-31.

2. *Maher shared information with Michael for varied reasons.* Maher occasionally shared information about his work with his older brother for a number of reasons.

When Maher first joined the healthcare group, he had no experience in that sector. JA.79. By contrast, Michael was highly knowledgeable in the field given his science background. Maher therefore occasionally sought Michael's advice. JA.79, 150-51. During these conversations, Maher and Michael openly discussed the companies that Citigroup was advising. JA.79-80. Maher gave Michael "clear instructions that [the] information...was confidential, and that [Maher] was really just trying

to gain an industry knowledge through his help." *Id.* Maher believed that conferring with Michael about his work was helpful to Citigroup: Michael's advice helped him become a "much more intelligent officer" who could have "fruitful scientific discussions with the officers of these public corporations." JA.82, 150-51.

As Maher's career progressed, he continued to use Michael as a "soundboard," to "vent about [his] career," and to let his big brother know about his achievements. JA.112, 154. Maher felt "extremely comfortable" discussing his work candidly with Michael. JA.97. Maher repeatedly told Michael that the information he was sharing was confidential. JA.85.

For example, in early 2005 Citigroup was pitching to provide financing for a significant client in an impending acquisition. JA.93-97. The CEO of that client was a wine connoisseur, so Maher asked Michael, who was also a wine enthusiast, to recommend some wines that Maher could present to the CEO as a gift. JA.95-97 It was important to Citigroup and to Maher that Citigroup win this deal, and Maher believed that this gesture—with Michael's help—would improve their chance of success. *Id.* Unbeknownst to Maher, Michael traded on the basis of this information. JA.269-70.[3]

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[3] Maher also came to believe that Michael eavesdropped on his work calls and, at one point, went behind Maher's back and snuck into his briefcase to look at documents related to potential merger and acquisition transactions. JA.160-62.

Maher admitted that in hindsight he may have been "naïve, relaxed, unguarded" with the information he shared, but he trusted Michael not to jeopardize his career by misusing the information. JA.85, 112. In Maher's words: "I just never could imagine that my brother would take it upon himself to trade in the companies that I was covering...we share the same last name, he knew how important the job was to me, how much I cared about it." JA.85.

Additionally, in late 2003, their father was diagnosed with terminal brain cancer. JA.80. The brothers were devastated by the news. They had constant discussions from the time of the diagnosis until their father's passing in November 2004 about drugs and drug companies that might help him. JA.80, 151-53. Michael spent two to three hours every day independently researching drugs and drug companies, and would regularly update Maher with his findings. Tr.1279-80. Maher, for his part, shared information that he had learned through his work. JA.80, 151-53.

Sometime in 2005 Michael began to ask Maher "more targeted" questions about companies and their businesses. JA.80-81. Maher continued to share information with Michael, but only after insisting that Michael promise that he was not trading based on that information. JA.81. Maher testified: "And I confronted him, and asked him point-blank, 'Are you trading in these companies?' And he flat-out denied it, and he swore on his daughter's life that he wasn't trading in it." *Id.*

In 2005 or 2006, Michael increasingly pestered Maher with questions about healthcare companies. *Id.* Maher avoided Michael's phone calls, told his wife not to answer the phone at home, and did not respond to Michael's emails. *Id.* Eventually, Michael's questioning "got to the point where it was so persistent and so nagging," according to Maher, "that to get him off my back....I knowingly tipped him, to get him off my back, and to benefit him." *Id.*; *see* JA.117-18. Even then, however, Michael never told Maher that he was trading on the information, although Maher suspected he was trading. JA.82, 159.

3. *Bassam Salman.* Salman worked as a grocery wholesaler in Chicago throughout the relevant period. JA.137, 284. He met Maher and Michael in 2002 when Salman's sister Sawsan began a relationship with Maher. JA.385-87. Maher and Sawsan married in July 2005. JA.388.

Michael and Salman started discussing stocks in September 2004. JA.254. In those first conversations, Michael told Salman "the names of certain companies that [he] was dealing with on a daily basis. Maybe four or five companies." JA.255. Michael also taught Salman how to trade options. JA.255-56.

Thereafter, Michael gave Salman investment recommendations based on his own research as well as on information that he had obtained from Maher. *See, e.g.*, JA.261-62, 271 73, 275-76, 289-92, 298-99. The government introduced evidence that, using another relative's brokerage account, Salman

engaged in trading that largely paralleled Michael's. JA.262-63, 276, 364. Michael testified that he told Salman that Maher was the source of his "investment strategies" and at least some of his information. JA.257, 266. And even though Michael claimed to have told Salman that Maher was his source, there was no evidence that Michael ever told Salman whether Maher was providing the information to him willingly, or what, if anything, Maher was receiving in return.

4. *The charges.* The substantive charges concerned Salman's trades in securities of United Surgical Partners International, Inc. ("USPI") in November and December 2006 and his trades in securities of Biosite Incorporated ("Biosite") in March 2007. The conspiracy count concerned those two companies as well as Bone Care International, Inc. ("Bone Care") and Andrx Corporation ("Andrx").

a. *Bone Care.* In April 2005, Citigroup was representing Bone Care in its sale to Genzyme Corporation. JA.50-51. Maher testified that he did not recall having any conversations with Michael about Bone Care. JA.99. Michael, however, testified that Maher told him Bone Care would be acquired. JA.278. Michael traded in the stock and also advised Salman to invest. JA.280. Salman followed his recommendation and bought Bone Care stock. JA.365.

b. *Andrx.* In January 2006, Citigroup was representing a company that sought to acquire Andrx. JA.107-08. Maher had worked on the deal extensively but supervisors removed him from the

assignment before the deal closed. He confided to Michael that this made him extremely upset. JA.111 12. Unbeknownst to Maher, Michael invested in Andrx in late February 2006. JA.295. Michael also recommended to Salman that he invest. JA.297. Salman bought call options in Andrx. JA.367.

c. *USPI.* In the summer of 2006, Citigroup was representing USPI's largest shareholder, a private equity firm, which was interested in buying out the other shareholders. JA.113-14. Maher testified that one day in August Michael told him that, based on his own research, USPI "looked cheap." JA.115. Maher agreed and told Michael that USPI was likely to be acquired by a private equity firm. JA.116. Michael bought USPI for himself and recommended it to Salman and others. JA.301, 304-06. Salman bought USPI call options in August 2006. Tr.1590-91. For months after their August conversation, Michael "persistently and repeatedly" called Maher to get more information about USPI. JA.117. Maher testified that he "did everything [he] could to sort of deflect it," but finally Maher caved and indicated that the deal was still progressing. *Id.*; JA.307-08. Michael bought more USPI call options through the fall of 2006 and continued to recommend it to Salman, who purchased additional USPI securities in November-December 2006. JA.306-09, 368-70.

d. *Biosite.* In early 2007, Citigroup was representing a client that was considering purchasing Biosite. JA.122. On March 22, 2007, Maher was in a taxi and returned a telephone call

from Michael from his cell phone. JA.123. Michael "didn't sound well"; he had been very ill and "sounded very down." JA.123-24. Michael said that he needed a favor, and asked Maher for information about a potential transaction. JA.124. This request presented a "sudden and unexpected situation" for Maher, and he was worried for his brother. *Id.* He "panick[ed]" and told Michael that Biosite might be acquired the following week. *Id.* Maher instantly regretted what he had done; he got out of the cab, began pacing on the sidewalk, and called Michael right back. JA.125, 164-65. Maher begged Michael not to act on the information or share it with anyone, to which Michael responded, "Don't worry." JA.125, 332-33.

Michael defied his brother. He traded in Biosite that day and also relayed the information to Salman, who traded, and others. JA.309-10, 313, 333.

5. *Maher was unaware that Michael was tipping others.* Maher did not know that Michael shared any of the information with anyone else. JA.129-31, 159, 168. When he finally learned what Michael had done, Maher felt: "Upset. Shocked. Angry. Defeated. Manipulated. Betrayed." JA.168-69; *see also* JA.143 (describing Michael as a "thief" and a "liar").

6. *Jury instructions and verdict.* The district court instructed the jury that to convict Salman of insider trading it needed to find, among other elements, that (1) the insider (here, Maher) personally benefitted from the disclosure of material,

nonpublic information, and (2) Salman knew that the insider had personally benefitted from the disclosure. Pet.App.59.

The district court instructed that "personal benefit" to the insider could include "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." Pet.App.61. The district court further instructed that the jury did not have to find that Salman knew "the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that [Salman] had a general understanding that the insider was improperly disclosing inside information for personal benefit." Pet.App.47.

The jury convicted on all counts, and Salman appealed.

B. Appeal

Shortly after Salman filed his reply brief, the Second Circuit decided *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015). Like this case, *Newman* involved defendants who were remote tippees. The Second Circuit held that the defendants had not committed a crime because the government failed to prove that the alleged tippers received any personal benefit, or that the defendants knew of any such benefit.

The court observed that prior Second Circuit cases indicated that "personal benefit" could include "the benefit one would obtain from simply making a

gift of confidential information to a trading relative or friend"—the same standard applied in Salman's case. *Id.* at 452. But the court found that this standard would contravene *Dirks*. *Id.*

The *Newman* court explained that the government may not "prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature," because "[i]f that were true,...the personal benefit requirement would be a nullity." *Id.* Accordingly, the court held: "To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider himself followed by a gift of the profits to the recipient,'...we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* And while "the tipper's gain need not be *immediately* pecuniary,...in order to form the basis for a fraudulent breach, the personal benefit received in exchange for confidential information must be of some consequence." *Id.* (emphasis in original).

Applying this standard, the Second Circuit held the evidence of personal benefit insufficient because the insiders in *Newman* had not participated in the requisite *quid pro quo* exchange. *Id.* at 452-53. (The government alleged that one insider had exchanged information with a college friend in exchange for "career advice," and that the other had tipped a friend from church. *Id.*) The

Second Circuit also found that the government failed to prove that the defendants knew of any personal benefit the insiders supposedly received. *Id.* at 453-55. The court thus reversed the convictions. *Id.* at 455.

The Ninth Circuit permitted the parties to file supplemental briefs addressing *Newman*'s effect on Salman's conviction. Salman argued that the evidence of personal benefit to Maher (and Salman's knowledge of any such benefit) was insufficient under *Newman*. Specifically, Salman argued that there was no evidence that Maher engaged in an exchange with Michael that yielded Maher even a potential pecuniary gain.

The Ninth Circuit disagreed. It declined to follow *Newman* and held that the government was not required to prove that the sibling relationship between Maher and Michael "generate[d] an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." Pet.App.15 ("To the extent *Newman* can be read to go so far, we decline to follow it."). Instead, the court found it sufficient under *Dirks* if the government proved that Maher "'ma[de] a gift of confidential information to a trading relative or friend.'" Pet.App.16 (quoting *Dirks*, 463 U.S. at 664). Holding that the government met this burden, the court affirmed Salman's conviction. Pet.App.16-17.

SUMMARY OF ARGUMENT

The crime of insider trading that Salman was charged with committing is entirely judge-made. Congress was aware of insider trading when it enacted §10(b), but chose *not* to address it in that statute. As a result, §10(b) does not mention insider trading, much less define its elements. The statute prohibits only "manipulative" and "deceptive" conduct in connection with the purchase or sale of securities, and there is nothing inherently manipulative or deceptive about insider trading.

I. Recognizing that "only Congress, and not the courts...can make conduct criminal," *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), this Court has repeatedly held that §10(b) does *not* create any general duty to refrain from trading on material nonpublic information, or entitle all investors in the securities markets to parity of information. The Court has, however, read into §10(b) a very limited proscription on insider trading. Under that narrow rule, a "tippee" must refrain from trading on inside information if, and only if, the information was disclosed by an insider in exchange for personal benefit, *and* the tippee knows that fact. The line between lawful trading and criminal activity, then, is determined by whether the insider—here, Maher—disclosed the information to obtain some personal benefit. If he did not, there was no §10(b) violation, and the "tippee" was free to trade.

II. The Court's reasoning in *Dirks* and other insider trading cases shows that its purpose was to limit §10(b) insider trading and tipping

liability to situations where the tipper sought to make money. Cabining securities fraud liability to circumstances where the tipper seeks remuneration also accords with precedents involving similar crimes, where the Court has required the government to prove that the defendant sought money or property. The focus of these fraud crimes, as here, is the improper exploitation of a fiduciary relationship for personal profit. The facts here involve no such misconduct. Maher did not trade or seek any kickback, and was pressured by his brother to leak the information.

III. Because of the judicial origin of the §10(b) insider trading crime and the indeterminacy of the Ninth Circuit's standard, the question presented implicates profound constitutional separation-of-powers and due process problems. To avoid those problems, the Court should apply well-established principles requiring a narrow construction of criminal statutes, and §10(b) in particular, to limit the ambit of the personal benefit element to core cases where an insider provides a tip in exchange for pecuniary gain. The alternative advanced by the government—that intangible psychological benefits also qualify—is impermissibly vague and would give the government boundless discretion to prosecute the exchange of inside information. If accepted, the government's position would create a general duty to refrain from trading on material nonpublic information, despite this Court's repeated holdings that §10(b) imposes no such duty.

IV Salman's convictions should be reversed. Under the correct standard, the government had to prove that Maher tipped his brother Michael in exchange for some pecuniary benefit, and that Salman knew this. There was no evidence of any such pecuniary benefit motive, and thus nothing to know and no crime. Moreover, even if the Court were to adopt a broader definition of personal benefit, it should not extend the implied §10(b) tipping offense to a remote tippee who, like Salman, had no involvement in the insider's alleged fraudulent fiduciary breach.

ARGUMENT

Section 10(b) makes it illegal "for any person, directly or indirectly,...[t]o use or employ, in connection with the purchase or sale of any security...any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe...." 15 U.S.C. §78j(b). The statute does not address, much less proscribe, "insider trading." The Court, not Congress, created the tipping crime and established its elements, including the personal benefit requirement. In doing so, the Court made clear that "tippees" can trade on inside information unless the original tipper committed *fraud*.

The Court's precedents addressing both insider trading and fraud outside the securities context require the government to show that the tipper acted with intent to obtain money or property for himself. This narrow construction of the personal benefit element is also required because of

the judicial origins of the crime, due-process vagueness concerns, and the rule of lenity. Under an appropriately limited definition of the personal benefit element, Salman did not commit any crime.

I. SECTION 10(B) DOES NOT EXPRESSLY BAN INSIDER TRADING, AND THE COURT HAS CAREFULLY LIMITED THE IMPLIED "TIPPING" CRIME

A. Section 10(b) prohibits only the use of "manipulative or deceptive device[s] or contrivance[s]" in connection with the purchase or sale of securities, in violation of any applicable SEC regulations. It contains no language about "tipping" or insider trading.

Notably, Congress was aware of concerns regarding insider trading when it enacted the Exchange Act.[4] But it elected not to criminalize insider trading in §10(b). Instead, Congress chose to proscribe only a narrow category of insider trading, short-swing profits by certain corporate insiders, and to provide only a private civil remedy for its violation. *See* 15 U.S.C. §78p(b); *see also* STEPHEN M. BAINBRIDGE, SECURITIES LAW: INSIDER TRADING 26-27 (2d ed. 2007) (legislative history of §10(b) shows Congress did not intend "to create a sweeping prohibition of insider trading"). Congress also rejected the idea of tippee liability in that context. *See Blau v. Lehman*, 368 U.S. 403, 411-12 (1962). This shows that Congress did not intend for §10(b) to

[4] *See, e.g.*, Donald C. Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 386 (1953).

be an anti-insider-trading rule. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

If the Court were inclined to reconsider its prior cases, it could readily hold, based on the plain language of the statute, that §10(b) does not prohibit insider trading at all—at least in the usual case where transactions are conducted anonymously in public markets, with no interaction with or deception of a counterparty. As Justice Scalia observed, "the unelaborated statutory language: '[t]o use or employ, in connection with the purchase or sale of any security...any manipulative or deceptive device or contrivance,' §10(b), must be construed to require the manipulation or deception of a party to a securities transaction." *United States v. O'Hagan*, 521 U.S. 642, 679 (1997) (concurring in part and dissenting in part). Commentators have recognized that "insider trading in no way resembles deceit.[5] No representation is made, nor is there any reliance, change of position, or causal connection between the defendant's act and the plaintiff's losses." Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV 1, 59 (1980). Moreover, since insider trading is not deceptive, and thus not expressly

[5] "Manipulat[ion]" is a term of art irrelevant here. It refers to "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977).

prohibited by the statute, it would be unconstitutional for the Court to create an insider trading crime. *See, e.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) ("separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact") *Bousley*, 523 U.S. at 620-21, *United States v. Hudson*, 7 Cranch 32, 34 (1812) (federal courts lack power to create common-law crimes; "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence"); *cf.* John C. Coffee, Jr., *The 'Tip' of the Bunny's Nose: Sniffing Out Crime Where None Exists*, LEGAL TIMES, Sept. 25, 1989, at 34, 35 ("law of insider trading is developing through after-the-fact judicial decision-making," which "inevitably leads to the criminal law's overexpansion" and violates separation of powers).

Furthermore, even though §10(b) defers to the SEC to define "manipulative or deceptive" conduct, the agency has never used its rulemaking authority to ban insider trading. Rule 10b–5 is a general anti-fraud provision, but it does not mention insider trading and encompasses only conduct already prohibited by §10(b). *See O'Hagan*, 521 U.S. at 651.[6] Although the SEC has promulgated two §10(b) insider trading rules, they do not address the personal benefit requirement and expressly defer to

[6] Similar to §10(b), Rule 10b–5 makes it unlawful to "employ any device, scheme or artifice to defraud," make a false statement or misleading omission, or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. §240.10b–5.

the courts to define this aspect of insider trading law. 17 C.F.R. §240.10b5–1 prelim. n. (disclaiming any intention to "modify the scope of insider trading law" which is "otherwise defined by judicial opinions"); 17 C.F.R. §240.10b5–2 prelim. n. (same). Consequently, the source of §10(b)'s limited ban on insider trading is entirely judicial.

B. This Court first addressed whether insider trading can violate §10(b) in *Chiarella v. United States*, 445 U.S. 222 (1980). The defendant was an employee of a financial printer who prepared printing announcements for corporate takeover bids. He deduced the identities of target companies before the announcements were released and, without disclosing that information, purchased shares in those companies, which he sold immediately after the takeover bids were made public. *Id.* at 224.

The issue presented was whether the employee violated §10(b) by failing to inform sellers that he knew of a forthcoming takeover bid. The government argued that the defendant was guilty so long as he used material nonpublic information while knowing that others trading in the market did not have access to the same information. This Court rejected the government's theory and refused to "recogniz[e] a general duty...to forgo actions based on material, nonpublic information." *Id.* at 233. Such a broad duty would "depart[] radically from the established doctrine that duty arises from a specific relationship between two parties." *Id.* The Court held that it could not adopt such a duty "absent some explicit evidence of congressional intent" to prohibit

all trading on nonpublic information, which did not exist. *Id.*

In fact, neither the statute nor its legislative history provided any "specific guidance" on whether insider trading can violate §10(b). *Id.* at 226. Relying principally on *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), an administrative opinion in a case that was settled, the Court held that corporate insiders who have material nonpublic information owe a duty to their shareholders to disclose the information before trading or else abstain from trading. 445 U.S. at 227-30.

But the Court stressed that §10(b) is an anti-*fraud* provision, and "not every instance of financial unfairness constitutes fraudulent activity under §10(b)." *Id.* at 232. Emphasizing prior precedents requiring §10(b) to be construed narrowly, the Court explained that the statute "is aptly described as a catchall provision, but what it catches must be fraud." *Id.* at 234-35. "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Id.* at 235. Thus, "silence in connection with the purchase or sale of securities may operate as a fraud actionable under §10(b)," but only where there is "a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Id.* at 230; *see also id.* at 235 ("We hold that a duty to disclose under §10(b) does not arise from the mere possession of nonpublic market information."). The Court thus held that the judicially-implied insider trading offense applies only where the person who trades has a fiduciary relationship with the issuer of the securities.

Because the defendant was not a corporate insider and received no confidential information from the target company, the Court held that he had no such fiduciary duty, and his conviction must be reversed. *Id.* at 231-33.

Three years later, in *Dirks*, the Court addressed tippee liability. Dirks was a securities analyst at a broker-dealer. He received material nonpublic information from Secrist, an insider at a life insurance company, who indicated that the company's assets were vastly overstated. Secrist tipped Dirks so that he could expose the fraud. Dirks relayed this information to clients and investors who sold their stock, thereby avoiding losses when the company's fraud became known and its stock price plummeted. The SEC sued Dirks, alleging that he had aided and abetted securities fraud by relaying material nonpublic information to people who traded the stock. 463 U.S. at 650-51.

This Court held that Dirks did not violate §10(b). The Court once again rejected the SEC's theory "that the antifraud provisions require equal information among all traders" as "inconsistent with congressional intent," and reaffirmed its holding in *Chiarella* that there is no general duty to refrain from insider trading. *Id.* at 656-57. The "disclose-or-refrain duty is *extraordinary*," and must be limited; "only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information." *Id.* at 657 (emphasis added; quotation marks omitted).

One of the Court's reasons for limiting the scope of §10(b) insider trading liability was that the free flow of information is essential to the fairness of the securities markets, and a strict ban on insider trading could over-deter the legitimate exchange of information and undermine the integrity of the marketplace. *Id.* at 658; *see also* Selective Disclosure & Insider Trading, Exchange Act Release No. 43154, 65 Fed. Reg. 51716-01, 51722 (Aug. 24, 2000) ("Analysts can provide a valuable service in sifting through and extracting information that would not be significant to the ordinary investor to reach material conclusions."); Andrew N. Vollmer, *How Hedge Fund Advisers Can Reduce Insider Trading Risk*, 3 J. SEC. L., REG. & COMPLIANCE 106, 107-08, 111-12 (2010) (describing the "variety of legitimate reasons" that analysts have "for communicating privately with the senior management of a public company").[7]

The Court held that a tippee is not liable "whenever he receives inside information from an insider," because a tippee generally owes no duty to the corporation's shareholders. *Dirks*, 463 U.S. at 655-56. However, a tippee who trades on inside information can violate §10(b) if the insider breached his fiduciary duty by disclosing the information, and the tippee knew that. *Id.* at 659-60. In this

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[7] Many scholars argue that a broad prohibition on insider trading can harm the securities markets. *See, e.g.*, Henry G. Manne, *The Case for Insider Trading*, WALL ST. J., Mar. 17, 2003; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 256-59 (1991); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 861-82 (1983).

situation, the tippee is considered derivatively liable for the insider's breach of duty. *See id.* at 659-60.

"Not 'all breaches of fiduciary duty in connection with a securities transaction,' however, come within the ambit of [§10(b) and] Rule 10b–5. There must also be 'manipulation or deception.'" *Id.* at 654 (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 472 (1977)). The Court held that the particular type of fiduciary breach that could be deceptive within the meaning of §10(b) is an insider's exploitation of corporate information for his own personal "benefit" or "gain." "Absent some *personal gain*" by the corporate insider, neither the insider nor the alleged tippee violates §10(b). 463 U.S at 662 (emphasis added). Insiders are "forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, [and] they may not give such information to an outsider for the same improper purpose of *exploiting* the information for their [*i.e.*, the insiders'] *personal gain*." *Id.* at 659 (emphasis added).

II. BENEFIT MEANS PECUNIARY GAIN UNDER THE COURT'S INSIDER TRADING AND FRAUD PRECEDENTS

The *Dirks* Court explained that the purpose of the personal benefit rule is to provide a "guiding principle" for market participants who daily encounter and transmit rumors, information and analysis. 463 U.S. at 664. Otherwise they would be "forced to rely on the reasonableness of the SEC's litigation strategy," a "hazardous" endeavor. *Id.* at

664 n.24. Consistent with that goal of providing a "guiding principle," the Court emphasized that the test for determining whether an insider sought a personal benefit should not require the government or the courts to "to read the parties' minds." *Id.* at 663. Rather, the test "focus[es] on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.*

The Court cited "cash, reciprocal information, or other things of value" as specific examples of benefits that would meet its test. *Id.* at 664 (citation omitted); *see also id.* at 654 (explaining that insider commits fraud "only where he fails to disclose material nonpublic information before trading on it and thus makes 'secret *profits*.'") (quoting *Cady, Roberts*, 40 S.E.C. at 916 n.31) (emphasis added). These examples, the Court's use of terms such as "gain" synonymously with "benefit," and its focus on insiders who "exploit" corporate information for "profit" show that it was principally concerned with situations in which the insider tips for pecuniary gain. The term "gain" connotes the improper use of corporate information to obtain something concrete, tangible and pecuniary. *See, e.g.*, BLACK'S LAW DICTIONARY 792 (10th ed. 2014) (defining "gain" as "[a]n increase in amount, degree, or value" and "[e]xcess of receipts over expenditures or of sale price over cost").

The Court identified "objective facts and circumstances that often justify" an inference of an insider's breach of duty. *Id.* at 664. The first is a

"quid pro quo" relationship between the insider and the tippee—in other words, a situation in which the insider is receiving something in return for the information. *Id.* But the Court also suggested that an insider's "intention to benefit" the tippee or "gift of confidential information to a trading relative or friend," where the "tip and trade resemble trading by the insider himself followed by a gift of profits to the recipient," might permit an inference of a fiduciary breach violating §10(b). *Id.*

As explained below, this language should not be read to allow a finding of personal benefit where the "benefit" is, at most, psychological and not pecuniary. The purpose of the test is to capture fraud by the insider, and this Court's precedents confirm that the core of fraud is the insider's exploitation of his position for personal profit, not for intangible benefits. Put another way, for tipping and trading on a "tip" to be fraudulent, the tipper's motive must be to obtain money or property for himself.

A. Insider Trading Precedents

The Court's express purpose in recognizing a limited form of tipping liability was to capture situations where an insider improperly "exploits" confidential information for "personal gain" in a manner analogous to the improper exploitation by an insider who trades without disclosing the information. *See Dirks*, 463 U.S. at 659, 662. That is why *Dirks* repeatedly instructs that tipping is fraudulent only if there is some personal benefit to the insider, and uses "benefit" interchangeably with

terms like "gain" that connote tangible monetary profit. The examples the Court employed to illustrate the type of benefit that would suffice involved financial benefits such as "pecuniary gain," "future earnings," "cash, reciprocal information, or other things of value." *Id.* at 663-64.

The Court drew on administrative and lower-court decisions that similarly involved only tangible financial benefits to the tipper, further confirming its focus on monetary gain. In *Cady, Roberts*, for example, a director of a public company who was also a broker provided the company's confidential information to his partner so that they could engage in profitable trades in the firm's clients' accounts. 40 S.E.C. 907 at [*2] (cited in *Dirks, passim*). In *Ross v. Licht*, the insiders tipped others so they could share in the profits from a public resale of the stock the tippees would acquire. 263 F. Supp. 395, 401 (S.D.N.Y. 1967) (cited at 463 U.S. at 661 n.20). Similarly, in *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the tipper received commissions and compensation on trades executed by its customers. 43 S.E.C. 933 at [*2] (1968) (cited at 463 U.S. at 654, 655).

The *Dirks* Court's focus on the insider's profit motive accords with *Chiarella* and other insider trading cases recognizing that fraud turns on the defendant's pecuniary motive. For example, when the Court first held that insider trading could be fraud, it relied on prior administrative and judicial decisions that involved insiders who received actual, pecuniary benefits—profits from trading or other monetary rewards. *See Chiarella*, 445 U.S. at 227-

30. The Court cited *Cady, Roberts*, discussed *supra*; *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), where the defendants made trading profits; and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), where they earned commissions and gratuities.

Likewise, in *O'Hagan*, the fraudster acted for his own pecuniary benefit. There the Court recognized that misappropriation of confidential corporate information can be fraudulent under §10(b) when the misappropriator "trades on the information" and makes money ($4.3 million). 521 U.S. at 648, 663. Significantly, the *O'Hagan* Court confirmed that the reason the insider in *Dirks* had not violated §10(b) was that he "had acted not for personal profit," but to expose a fraud. *Id.* at 663.

Similarly, in *Carpenter v. United States*, 484 U.S. 19 (1987), the Court upheld mail and wire fraud convictions for insider trading because a *Wall Street Journal* writer exploited the *Journal*'s confidential information by leaking it to brokers who traded and gave the writer a share of the profits. The Court drew on sources including common-law fiduciary duty claims that can be brought to recover trading "'profits'" from a person who "'exploit[s]'" information acquired from his fiduciary "'for his own personal benefit.'" *Id.* at 27-28 (quoting *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497 (1969)).

Pecuniary gain is also required in the short-swing profit insider trading statute discussed *supra* at 21, even though it is not a fraud provision. There, "profit" signifies "direct pecuniary benefit to the

insider." *CBI Indus., Inc. v. Horton*, 682 F.2d 643, 646 (7th Cir. 1982) (Posner, J.). In that context, a familial relationship is not a sufficient benefit: "[I]t is not enough that ties of affinity or consanguinity between the nominal recipient and the insider make it likely that the insider will experience an enhanced sense of well-being as a result of the receipt, or will be led to reduce his gift-giving to the recipient." *Id.* On the contrary, "[t]he standard of direct pecuniary benefit excludes by definition any attempt to monetize the emotional satisfaction that [a defendant] might derive from a transaction that increased the wealth of his sons." *Id.* at 647.

B. Analogous Crimes

The Court has emphasized tangible gain when construing federal fraud statutes outside the insider trading context as well. These cases, like the §10(b) insider trading cases, often present the question of when a person's breach of duty to the public or her employer can constitute criminal fraud. There, as here, criminality turns on whether the person has exploited her position for personal gain; the focus is money or property, not intangible "benefits."

For instance, in *McNally v. United States*, 483 U.S. 350 (1987), the Court construed the mail fraud statute, which prohibits fraudulent schemes to "obtain[] money or property." The Court held that such fraud was "limited in scope to the protection of property rights" and thus did not cover a state official's purported scheme to deprive the public of his "honest services." Then, in *Skilling v. United States*, the Court limited the scope of the ensuing

"honest services fraud" statute to cases involving a *quid pro quo* exchange for money, *i.e.*, "bribes or kickbacks." 561 U.S. 358, 407-09 (2010). The Court emphasized that such pecuniary exchanges were the "core" of the offense, in part because of similar statutes that also focused on public officials' misconduct-for-monetary-profit schemes. *See id.* at 412-13; *see also Cleveland v. United States*, 531 U.S. 12, 22-23 (2000) (false statements on state video poker license application not mail fraud because defendants did not obtain money or "economic" property through their deceit). And in the related context of Hobbs Act extortion, the Court has rejected the invitation to treat "abstract" benefits like a recommendation as "property" the defendant sought to obtain. *See Sekhar v. United States*, 133 S. Ct. 2720, 2726-27 (2013).

In short, under the Court's precedents, trading on a tip can only be fraud if the tipper's purpose was to obtain some pecuniary benefit.

C. This Case Does Not Involve Any Securities Fraud

The facts of this case are far afield from the fraudulent conduct the Court read §10(b), like other anti-fraud provisions, to cover. Maher did not trade on the information, and he did not provide it to get a kickback. On the contrary, Maher gained nothing of value from his disclosures, and had no financial motive. His motive was to get a bullying brother "off his back." Indeed, the government has conceded that Maher's "breaches of fiduciary duty were in large part the result of Michael Kara's persistence in

seeking inside information." Sentencing Mem. at 7, *United States v. Kara*, No. 09-cr-00417-EMC-1 (N.D. Cal. Dec. 15, 2014) (Dkt. No. 249). The government acknowledged that Maher had a "complicated relationship with his brother, clearly." JA.402. Their relationship involved love and trust, but Michael also manipulated and deceived Maher. In most instances Maher disclosed information to Michael either with the understanding that his brother would not trade on it and would keep it confidential—Michael swore "on his daughter's life" that he would not trade, JA.81—or because Michael pressured him into providing the information. Maher opposed trading on inside information and discouraged Michael from doing so. These facts could hardly be more remote from the type of corrupt exchange the *Dirks* Court found §10(b) to capture.

III. THE CONSTITUTION AND INTERPRETIVE PRINCIPLES REQUIRE LIMITING THE PERSONAL BENEFIT ELEMENT TO PECUNIARY GAIN

Equating "personal benefit" with pecuniary gain not only comports with the Court's precedents, but also is necessary because any broader standard would be unconstitutional and inconsistent with interpretive principles requiring a clear and circumscribed rule.

A. Longstanding Interpretive Principles Dictate A Narrow Construction Of The Personal Benefit Element

1. *Criminal laws must be interpreted strictly.* Separation of powers, due process, and the related rule of lenity compel a limiting construction because a willful violation of §10(b) is a crime. 15 U.S.C. §78ff(a).[8] First, as this Court has repeatedly held, "penal laws are to be construed strictly" because "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). Courts have no authority to "define new federal crimes." *Skilling*, 561 U.S. at 415 (Scalia, J., concurring in part and concurring in judgment) (citing *Hudson*, 7 Cranch at 34); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) ("federal crimes are defined by statute rather than by common law"); *Lewis v. United States*, 523 U.S. 155, 160 (1998) (federal courts cannot "supplement... statutory crimes through the use of the common law").

Second, it is a violation of the Due Process Clause to "tak[e] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it

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[8] When a statute has both civil and criminal applications, the Court "must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context," including by applying the rule of lenity to construe the statute narrowly. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also Whitman v. United States*, 135 S. Ct. 352, 353-54 (2014) (Scalia, J., respecting denial of certiorari).

punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see also, e.g.*, *Skilling*, 561 U.S. at 402-03. The Court can sometimes save a statute that would otherwise be void for vagueness—and thus avoid the constitutional question—by interpreting it narrowly. *See, e.g.*, *Skilling*, 561 U.S. at 405. But the Court may not "rewrite" the statute in order to save it. *See id.* at 415, 423-24 (Scalia, J., concurring in part and concurring in judgment).

Third, to the extent there is any ambiguity about the meaning of the personal benefit requirement, such ambiguity "should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 25 (quotation marks omitted); *see also, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). "[T]his time-honored interpretive guideline serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quotation marks omitted). Given the absence of any applicable statutory text, the need for a lenient construction is even stronger here. After all, the basis for the rule of lenity is that "the power of punishment is vested in the legislative, not in the judicial department," and "the legislature, not the Court,...is to define a crime." *Wiltberger*, 18 U.S. at 95.

2. *Section 10(b) is narrowly interpreted even in civil cases, to avoid a separation-of-powers problem.* In its insider trading decisions, the Court has emphasized the need to construe §10(b)

narrowly, explaining that "the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit." *Chiarella*, 445 U.S. at 234 (quotation marks omitted); *see also O'Hagan*, 521 U.S. at 651. The Court has articulated a similar limiting principle in defining the scope of the §10(b) private civil action, which was judicially implied just like the insider trading offense. For instance, in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Court held that only purchasers or sellers of securities could bring private §10(b) suits. The Court reasoned that Congress "had little trouble in...expressly" providing a civil remedy in other provisions to those who neither purchase nor sell securities, but had not expressly done so in §10(b), and that the §10(b) private action should be circumscribed because it was "judicially[-created]." *Id.* at 734, 749.

Similarly, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court observed that "our cases considering the scope of conduct prohibited by §10(b) in private suits have emphasized adherence to the statutory language," and that the Court has "refused to allow 10b–5 challenges to conduct not prohibited by the text of the statute." *Id.* at 173. Because "[i]t is inconsistent with settled methodology in §10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text," and the text of §10(b) does not reach those who aid or abet a violation, the Court refused to recognize a private action for aiding and abetting. *Id.* at 177. Likewise, in *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135 (2011), the Court emphasized the

"narrow scope" and "narrow dimensions" of the judicially implied §10(b) cause of action because "Congress did not authorize [it] when it first enacted the statute and did not expand [it] when it revisited the law." *Id.* at 142, 144 (refusing to extend §10(b) to defendant who was involved in but did not make false statements).

In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), the Court applied this narrow construction rule to reject private §10(b) "scheme liability." The Court explained that the limiting-construction rule in §10(b) cases is designed to avoid a constitutional separation-of-powers problem. The §10(b) private action "is a judicial construct that Congress did not enact in the text of the relevant statutes." 552 U.S. at 164. A limiting construction is thus required to avoid an exercise of power by the federal courts that "'conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction.'" *Id.* at 164-65 (citation omitted). "Concerns with the judicial creation of a private cause of action caution against its expansion....Though it remains the law, the §10(b) private right should not be extended beyond its present boundaries." *Id.* at 165.

These separation-of-powers concerns are implicated here too, because the insider trading offense, like the private §10(b) action, was created by the judiciary. *See* Andrew N. Vollmer, *A Rule of Construction for* Salman, Va. Pub. L. & Legal Theory Research Paper No. 28 (2016), *available at* http://ssrn.com/abstract=2749834. Indeed, these constitutional concerns are even more serious here

than in the civil context, because a person's liberty is at stake. *See Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.").

B. The Ninth Circuit's Standard Is Indeterminate

If a gift or intention to benefit the tippee were enough to establish a personal benefit to the tipper, that would undermine the *Dirks* Court's desire to have a "limiting principle" to guide those "whose daily activities must be limited and instructed" by the insider trading rules, 463 U.S. at 664, as well as due process principles requiring fair notice discussed above.

By definition, a gift is intended to benefit the recipient; the giver neither receives nor typically expects a benefit in return. For example, the common-law meaning of "gift" is a voluntary transfer of property without consideration. *E.g.*, *Kehr v. Smith*, 87 U.S. 31, 34 (1873); BLACK'S LAW DICTIONARY 803 (10th ed. 2014) (defining gift as "voluntary transfer of property to another without compensation"). Likewise, under the tax code a gift "proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses." *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (quotation marks and citation omitted). If giving something of value to another "proceeds primarily from...'the incentive of anticipated benefit' of an economic nature, it is not a

gift." *Id.* (quoting *Bogardus v. Comm'r*, 302 U.S. 34, 41 (1937)).

In arguing that a "gift" nevertheless qualifies as a benefit to the insider, the government presumably means to imply that the insider receives emotional satisfaction from giving the gift. But the insider will *always* have some kind of emotional response to the disclosure of corporate information. Which emotions give rise to insider trading liability, and which do not? The government has never answered this question, precisely because it wants to maximize its ability to punish insider trading regardless of whether the insider benefited in any concrete or tangible way. Any suggestion that the personal benefit requirement could be established by psychic gratification, such as the satisfaction derived from giving a gift, would render the requirement impermissibly vague. Such a malleable standard would be at odds with the due-process-based need for a bright line that "so clearly" advises market participants "in advance how to avoid an unlawful course of action." *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621-22 (1946). It would also require traders, the courts, and the government to "read the parties' minds"—the precise uncertainty that the Court sought to avoid by focusing on "objective facts." *Dirks*, 463 U.S. at 663-64. Psychic reward necessarily turns on an inherently subjective inquiry, which fails to provide "an ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 89 (1921). It should not be the touchstone for criminal liability.

In *Dirks*, for example, Secrist (the insider) likely obtained some personal satisfaction from exposing the fraud. One could plausibly argue that Secrist was giving a "gift" to Dirks when he disclosed that the company's assets were overstated, and when he allowed Dirks to expose the fraud, trade on the information, or tip others. After all, Secrist clearly knew that Dirks worked at a broker-dealer and would likely share the information with his investor-clients. *See* 463 U.S. at 648. But the Court found no benefit and no fraudulent fiduciary breach: "Under any objective standard, Secrist received no direct or indirect personal benefit from the disclosure." *Id.* at 666 n.27. Notably, the Court expressly rejected the notion that there is a fraud "whenever inside information is intentionally disclosed to securities traders." *Id.* It plainly would have reached the same result even if Secrist and Dirks had been relatives or friends. Under the Ninth Circuit's theory, by contrast, Secrist and Dirks would both be liable if they had had some personal relationship, since Secrist gave Dirks material nonpublic information knowing he would trade on it.

This case also illustrates how a standard that allows a finding of personal benefit based only on the parties' relationship can become a trap for the unwary. Any benefit Maher might have received is purely emotional, and it is unclear what that benefit could have been. His conduct resulted in anxiety, not psychic reward. If this qualifies as a "benefit" under the "gift" theory—as the government argued and the Ninth Circuit accepted—then virtually any disclosure of confidential information to a friend or relative could suffice, regardless of the tipper's

motive or whether the tipper obtains any concrete benefit from the exchange.

Cases involving remote tippees such as Salman also underscore the need for a clearer and more circumscribed definition of "personal benefit." A direct tippee is personally involved in the transfer of information and thus likely to be in a position to know the insider's motives. By contrast, a remote tippee often has no information about the tipper's motive. A remote tippee may know only the identity of and relationship between the parties, but nothing more. Because any benefit from making a gift is at best emotional or psychological and depends on the tipper's subjective state of mind, it will typically be impossible, especially for a remote tippee, to discern. What sort of relationship between the insider and the immediate tippee will suffice is also unclear. Where is the line between a "friend" and an acquaintance? Is an in-law a "relative"? If an insider's mother remarries after his father dies, is her new husband's child the insider's "relative"? Under the Ninth Circuit's indeterminate standard, ascertaining whether conduct falls within the statute's prohibited scope "devolv[es] into guesswork and intuition," triggering due-process vagueness concerns. *Johnson*, 135 S. Ct. at 2559.

This is a very real concern, because an insider's disclosure of confidential information to a friend or relative who might trade does not always reflect serious misconduct. There are many situations where insiders make such disclosures for innocent reasons or by mistake. For example, an insider might reveal corporate information to a

friend or relative inadvertently, *e.g.*, *Goetz*, SEC Litig. Release No. 21990, 2011 WL 2187726 (June 6, 2011); as part of his obligation to conduct due diligence for his employer, *e.g.*, *SEC v. Obus*, 693 F.3d 276, 290 (2d Cir. 2012); in managing family schedules ("I need to fly to Cupertino tomorrow for a work emergency"); or as occurred with some of the information here, to learn about scientific concepts relevant to his work or to contribute to discussions about a family member's medical problem, *supra* at 10.

As this Court has explained, securities law is "'an area that demands certainty and predictability.'" *Central Bank*, 511 U.S. at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). Congress and the SEC have committed volumes of legislation and regulations to ensuring that market actors understand the precise boundaries of permissible conduct.[9] Yet the government advocates a position that, if accepted, would render the most basic issue in securities law—whether a party may buy or sell a security—hopelessly vague. Particularly in complex regulatory regimes, however, rules "must be explicit and unambiguous in order to sustain a criminal prosecution." *M. Kraus & Bros.*, 327 U.S. at 621.

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[9] *See, e.g.*, 15 U.S.C. §77g, 17 C.F.R. §230.400 *et seq.* (registration statement requirements); 17 C.F.R. Part 229 (specifying nature and format of periodic disclosures issuers must make to investors); 17 C.F.R. §240.14a–1 *et seq.* (rules for proxy solicitations); 17 C.F.R. Part 243 (rules regarding selective disclosures).

C. The Ninth Circuit's Approach Unconstitutionally Delegates To Prosecutors The Power To Define The Crime

Using a "gift" concept as a proxy for the personal benefit element is also problematic because it fails to "'establish minimal guidelines to govern law enforcement'"—the most "important aspect of vagueness doctrine." *Kolender*, 461 U.S. at 358 (citation omitted). The *Dirks* Court sought to avoid a situation in which prosecutorial whim determines whether conduct is punishable. *See* 463 U.S. at 664 n.24 (holding that market participants should not be "forced to rely on the reasonableness of the [government's] litigation strategy"). Yet, in the three-plus decades since *Dirks*, the Department of Justice and the SEC have effectively nullified the personal benefit requirement by invoking the "gift" talisman whenever there is no tangible economic benefit to the tipper. *See generally* Stephen J. Crimmins, *Insider Trading: Where Is the Line?*, 2013 COLUM. BUS. L. REV. 330, 347 (2013). As a consequence, the personal benefit requirement, as applied, rarely presents a barrier to government action, even though trading on inside information is generally *not* illegal, and the *Dirks* Court sought to limit the scope of tip-based liability to "extraordinary" cases. 463 U.S. at 657.

1. *Pre-*Newman *overbreadth*. Until *Newman*, the lower courts typically rubber-stamped the government's watered-down version of the personal benefit requirement. Ignoring this Court's repeated holdings that there is no general duty to refrain from

trading on inside information, many lower courts have simply assumed that if an insider discloses material nonpublic information to an outsider this is enough to create an inference that the insider intended to benefit the tippee and thus to obtain some emotional or psychological benefit for himself. For example, the Seventh Circuit has concluded that "[a]bsent some legitimate reason for [the insider's] disclosure..., the inference that [his] disclosure was an improper gift of confidential corporation information is unassailable. After all, he did not have to make any disclosure, so why tell [the tippee] anything?" *SEC v. Maio*, 51 F.3d 623, 633 (7th Cir. 1995). *See also, e.g., SEC v. Blackwell*, 291 F. Supp. 2d 673, 692 (S.D. Ohio 2003) ("A mere allegation that the insider has disclosed material non-public information is sufficient to create a legal inference that the insider intended to provide a gift to the recipient of the information, thereby establishing the personal benefit requirement."); *SEC v. Blackman*, No. 3:99-1072, 2000 WL 868770, at *9 (M.D. Tenn. 2000) ("[T]he mere fact of [a tipper's] disclosure of... information sufficiently alleges a gift by him...so as to satisfy the personal benefit requirement of *Dirks*."); *SEC v. Rubin*, No. 91 Civ. 6531 (MBM), 1993 WL 405428, at *5 (S.D.N.Y. Oct. 8, 1993) (fact that tippee was tipper's broker was sufficient to create inference of personal benefit "absent evidence of an identifiable proper motive to disclose the information in question").

This approach turns on its head the Court's intention that the personal benefit test serve as a limiting principle to cabin §10(b) insider trading liability to extraordinary cases. A weak, ephemeral

standard invites prosecutors to abuse their power and risks exactly the discriminatory enforcement that the vagueness doctrine is designed to prevent, "raising the specter of potentially charging everybody...and seeing what sticks and who flips." *Ocasio v. United States*, No. 14-361, ---S. Ct.---, slip op. at 11 (May 2, 2016) (Sotomayor, J., dissenting).

That risk is not merely theoretical. In recent years the government has pursued an extremely aggressive litigation strategy to reduce the significance of the personal benefit requirement to virtually nil. The government has brought numerous prosecutions and enforcement actions where a tipper gratuitously provided information to a friend or relative. In those cases, there was no evidence that the tipper sought to profit from the tip, yet the government claimed a benefit solely because of the relationship between tipper and tippee. *See, e.g., United States v. Gansman*, 657 F.3d 85 (2d Cir. 2011) (extramarital affair); *United States v. Evans*, 486 F.3d 315 (7th Cir. 2007) (friends); *SEC v. Rocklage*, 470 F.3d 1 (1st Cir. 2006) (siblings); *SEC v. Warde*, 151 F.3d 42 (2d Cir. 1998) (friends); *United States v. Adcox*, CR A. NO. 15-00036-01, 2016 WL 616533 (W.D. La. Feb. 16, 2016) (brothers-in-law); *SEC v. Palermo*, No. 99 Civ. 10067(AGS), 2001 WL 1160612, at *7 (S.D.N.Y. Oct. 2, 2001) (friends). In many such instances, the tipper and tippee were not even close friends or relatives but mere casual acquaintances. *See, e.g., United States v. Cusimano*, 123 F.3d 83, 85 (2d Cir. 1997) ("subordinate and friend"); *SEC v. Maxwell*, 341 F. Supp. 2d 941 (S.D. Ohio 2004) (barber and customer); *United States v.*

ReBrook, 837 F Supp. 162 (S.D.W Va. 1993) ("acquaintances").

The government has also cast a wide net, pursuing remote tippees who have no relationship with the original tipper. For instance, in *SEC v. Conradt*, the SEC did not allege that the remote tippee knew the original source of the information, "let alone knew that the [source and the initial tippee] had a relationship of trust and confidence or that [the tipper] had obtained the information in breach of that relationship." 947 F. Supp. 2d 406, 412 (S.D.N.Y. 2013). *See also, e.g., United States v. McDermott*, 245 F.3d 133, 136 (2d Cir. 2001) (remote tippee received information through girlfriend, who was having affair with another man); *SEC v. Sargent*, 229 F.3d 68, 72-73 (1st Cir. 2000) (remote tippee received information from tipper's dentist). The *Newman* case is a paradigmatic example. The original tippers were insiders at two companies; one provided information to an acquaintance from college, supposedly to get "career advice," and the other gave it to a friend at church. The tippee-defendants were hedge fund managers who received the information fourth- or fifth-hand, only after it had passed through several intermediaries; the tippee-defendants did not know who the insiders were or why they had disclosed the information. Yet until their convictions were overturned by the Second Circuit, these defendants faced lengthy prison terms of 4½ and 6½ years. 773 F.3d at 444.

2. *The failed role of scienter.* The scienter requirement does not alleviate the vagueness problems caused by such an overbroad personal

benefit requirement. *Cf. O'Hagan*, 521 U.S. at 665-66 (rejecting vagueness attack on misappropriation theory of insider trading due to "sturdy safeguards Congress has provided regarding scienter"). To establish criminal liability, the government must prove that the defendant "willfully" violated §10(b). *See* 15 U.S.C. §78ff(a). This requires the government to prove "that the defendant acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (citing *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)); *see also Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 n.9 (2007) (as used in criminal statutes, "willfully" "limit[s] liability to knowing violations," *i.e.*, requiring defendant's "'knowledge that his conduct was unlawful'") (citation omitted).

However, the Ninth Circuit has gutted this safeguard against government overreaching by holding that mere recklessness can support *criminal* liability for securities fraud. *See United States v. Tarallo*, 380 F.3d 1174, 1188-90 (9th Cir. 2004).[10] The Ninth Circuit's application of the "willful blindness" doctrine also effectively reduces the knowledge-of-personal-benefit element of the crime to a mere negligence standard. This Court has held that willful blindness can establish actual knowledge only if the government shows that the defendant believes that there is "a high probability that a fact exists" and "take[s] deliberate actions to avoid

[10] The district court thus specifically instructed Salman's jury that "[a]cting willfully does not require that the defendant know that the conduct was unlawful"; [t]he government is not required to prove that the defendant knew that his acts were unlawful." Pet.App.56.

learning of that fact." *Global-Tech Appliances, Inc. v. SEB, S.A.*, 563 U.S. 754, 769 (2011). Yet the Ninth Circuit does not require any "deliberate actions" and instead held that merely showing that "a reasonable person would make further inquiries" suffices. Pet.App.24.

Particularly for remote tippees, the weak scienter standard solidifies the government's ability to bring charges as if the law created a general duty to refrain from trading on material nonpublic information, even though it does not. Under the Ninth Circuit standard, anyone who learns inside information has an affirmative duty to investigate who was the source of the information and what his motive for disclosing it was, or risk imprisonment.

This problem is further compounded by the government's repeated efforts to avoid even having to prove scienter. For example, it argued in *Newman* that a defendant may be convicted of insider trading even if the defendant did not know that the information was disclosed by an insider for personal benefit. The Second Circuit disagreed, in light of this Court's reasoning in *Dirks* and its well-settled precedents requiring the government to prove defendants' knowledge of the facts that make their conduct criminal. *Newman*, 773 F.3d at 447-51. But then the government took a different tack, attempting to dilute the knowledge requirement. The government maintained in its petitions for rehearing en banc and certiorari that knowledge of facts like the specificity of the information, its apparently nonpublic nature, or that it came from an insider is sufficient to prove a personal benefit—even

though none of this "proof" shows whether or how the insider actually benefited. *See, e.g.*, Pet. for Writ of Cert., *United States v. Newman*, No. 15-137, at 31 (arguing that remote tippees "at least consciously avoided confirming" that "detailed pre-announcement earnings-related information" was "disclosed by insiders for personal advantage"). The government has made similar arguments in other cases, even in the Second Circuit post-*Newman*. *See, e.g.*, SEC Mem. at 18, *SEC v. Payton*, 14 Civ. 4644 (S.D.N.Y. Aug. 24, 2015) (Dkt. No. 60); Gov't Mem. at 21-22, *United States v. Kimelman*, 10 Cr. 0056 (S.D.N.Y. May 4, 2015) (Dkt. No. 340); SEC Mem. at 12-13, *SEC v. Jafar*, 13 Civ. 4645 (S.D.N.Y. Feb. 13, 2015) (Dkt. No. 93).

Not surprisingly, then, most defendants confronted with insider trading charges feel they have no choice but to plead guilty or settle, no matter how thin the evidence of personal benefit might be. The reasons for this include the immense costs of litigation, the lower courts' frequent acquiescence in the government's overreaching, and the draconian potential prison sentences for insider trading. *See, e.g.*, Sentencing Tr. at 45, 49, *United States v. Riley*, 13 Cr. 339 (S.D.N.Y. Apr. 27, 2015) (78-month sentence for defendant-tipper whose personal gain was characterized by district court as "peanuts" and "essentially nothing"); Judgment, *United States v. Skowron*, 11 Cr. 699 (S.D.N.Y. Nov. 22, 2011) (Dkt. No. 27) (60-month sentence for tippee who pled guilty); Judgment, *United States v. Drimal*, 10 Cr. 056 (S.D.N.Y. Aug. 31, 2011) (Dkt. No. 261) (66-month sentence for remote tippee who pled guilty); Judgment, *United States v. Contorinis*, 09

Cr. 1083 (S.D.N.Y. Dec. 22, 2010) (Dkt. No. 94) (72-month sentence for tippee); *see generally* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014) (arguing that Sentencing Guidelines, although no longer mandatory, "provide prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains"). Indeed, six defendants facing charges in connection with the *Newman* case pleaded guilty and cooperated to avoid long prison sentences, even though the government was later forced to concede their innocence and consent to withdrawal of their pleas in light of the Second Circuit's ruling. *See* Statement of U.S. Attorney Preet Bharara (Oct. 22, 2015), https://www.justice.gov/usao-sdny/pr/statement-us-attorney-preet-bharara-dismissal-charges-against-michael-steinberg-and-six.

3. *The de facto standard is now the "parity-of-information" rule that this Court repeatedly rejected.* With only a vague personal benefit requirement, the government has effectively usurped the power to define the §10(b) insider trading violation. Before *Newman*, the personal benefit element had been reduced to a meaningless peppercorn, subverting this Court's careful efforts to limit the tipping violation. As the *Newman* court observed, the personal benefit standard "does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the

personal benefit requirement would be a nullity." 773 F.3d at 452.[11]

The government's overreaching has defeated the *Dirks* Court's goal of limiting the disclose-or-refrain duty to "extraordinary" situations that are clearly delineated. In the present environment, market participants who are merely exposed to material nonpublic information trade at their peril. The *de facto* rule is therefore not the law articulated by this Court, but instead the "parity-of-information" rule that the Court has repeatedly rejected. Responsible market participants cannot ignore the risk of overzealous prosecutions even in instances where there is no objective evidence of personal benefit. This situation has resulted in precisely the arbitrary and discriminatory enforcement the Due Process Clause is designed to prevent. *See Kolender*, 461 U.S. at 358 (warning of dangers caused by vague criminal statutes that "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections'") (citation omitted); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (same).

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[11] As one noted securities-law scholar observed, *Newman* "finally put a judicial cap on" the government's "quest to expand the definition of insider trading to capture virtually every information asymmetry and the virtual presumption of guilt" in its press releases. Stephen Bainbridge, *US v Newman: A Big Win for Coherence and Fairness in Insider Trading Law*, PROFESSORBAINBRIDGE.COM (Dec. 11, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/12/us-v-newman-a-big-win-for-coherence-and-fairness-in-insider-trading-law.html.

Even if a broad ban on tippee trading were the best policy, that is for Congress, and not the courts, much less the prosecutors, to determine. "The role of this Court is to apply the statute as it is written—even if [it] thinks some other approach might 'accor[d] with good policy.'" *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (quoting *Comm'r v. Lundy*, 516 U.S. 235, 252 (1996)). *See also United States v. Santos*, 553 U.S. 507, 523 (2008) ("[E]ven if ...statutory ambiguity 'effectively' licenses us to write a brand-new law, we cannot accept that power in a criminal case, where the law must be written by Congress.") (plurality opinion). As Justice Scalia observed: "Deferring to the prosecution branch's expansive views of [statutes like §10(b)] 'would turn [their] normal construction...upside-down, replacing the doctrine of lenity with a doctrine of severity.'" *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting denial of certiorari) (citation omitted).

Congress has not seen fit to ban insider trading or codify a parity-of-information rule, so it is often perfectly legal to trade on material nonpublic information.[12] "To punish a person because he has

[12] One reason for this may be that there are other mechanisms to deter the illicit disclosure of inside information. For instance, the SEC's Regulation FD prohibits issuers and certain of their personnel from making selective disclosures to investment professionals, 17 C.F.R. §243.100; state law remedies may be available for shareholders to assert claims based on insider trading, DONALD C. LANGEVOORT, 18 INSIDER TRADING REGULATION, ENFORCEMENT, & PREVENTION §10:12 (2016); by statute, broker-dealers must maintain and enforce written policies "to prevent the misuse...of material, nonpublic information by such broker or dealer or any person associated

done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Until Congress bans all insider trading, market participants have a right to a clear line so that they can trade, even based on inside information, when doing so is legal, rather than being forced to avoid engaging in legal activity because the standard is malleable and subject to manipulation by zealous government officials. This is true regardless of whether insider trading violates ethical or moral norms. *See, e.g., Skilling*, 561 U.S. at 410 (failure to disclose conflict of interest does not violate criminal honest services fraud statute); Coffee, *supra*, at 35 ("To realize the criminal law's normative goal, people must be able to arrange their affairs to avoid entanglement with the criminal law.") (citing HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968)).[13]

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with such broker or dealer," 15 U.S.C. §78*o*(g); and companies typically maintain internal policies and procedures to prevent insider trading, as was the case here, Langevoort, *supra*, §12.6. There is no reason to think these other measures are inadequate; criminal punishment should be reserved for egregious misconduct, not basic regulation of the securities markets.

[13] There is no societal consensus that insider trading is inherently wrongful. *See, e.g.*, John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1 (2014); Jonathan R. Macey, *Ethics, Economics, and Insider Trading: Ayn Rand Meets the Theory of the Firm*, 11 HARV. J.L. & PUB. POL'Y 785 (1988). Indeed, the Second Circuit has required a higher level of scienter in insider trading cases

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In sum, a pecuniary benefit is the paradigmatic benefit described not only in *Dirks*, but also in this Court's other insider trading cases, the lower-court and administrative decisions that the Court relied on to create the insider trading §10(b) offense, and the Court's decisions holding that other fraud offenses require a showing that the fraudster acted to obtain money or property. Constitutional principles also demand that *Dirks*' personal benefit requirement be limited to pecuniary gain. That interpretation avoids the inherent vagueness of reading *Dirks*' "gift" language too broadly, as well as the attendant separation-of-powers concerns. *See generally Burrage*, 134 S. Ct. at 891 ("Especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.") (citation omitted).

As Judge Easterbrook pointed out when reversing an honest services fraud conviction based on a similarly amorphous benefit theory: "It is linguistically *possible* to understand 'private gain' as

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(continued...)

(knowledge of "unlawfulness") than in prosecutions for "deliberately mislead[ing] investors about a security" (only knowledge of "wrongfulness" is required), even though "willfulness" is the standard in both contexts. "Unlike securities fraud, insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010); *accord Newman*, 773 F.3d at 450.

whatever adds to the employee's income or psyche—anything the employee would pay to have, rather than pay to avoid—but the Rule of Lenity counsels us not to read criminal statutes for everything they can be worth." *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007). The prohibited gain must "come[] from third parties who suborn the employee with side payments." *Id.* Employees might breach their fiduciary duties for "psychic benefit[s]" such as "friendship" or the "approbation" of others, but these are simply not "the sort of 'private gain' that makes an act criminal under" the honest services fraud statute. *Id.* Nor should such psychic benefits make tipping by a corporate insider, or trading on that insider's tip, criminal securities fraud.

IV. THE COURT SHOULD REVERSE SALMAN'S CONVICTIONS

No reasonable juror could find Salman guilty beyond a reasonable doubt.

A. Application of the principles set forth above requires reversal of Salman's conviction. It is undisputed that Maher received no pecuniary gain in exchange for disclosing the information to Michael. This was confirmed by the district court and the SEC in related proceedings. *See supra* at 5. Accordingly, Maher did not commit securities fraud, and Salman was free to trade on the information: "[T]he tippee's duty to disclose or abstain is derivative from that of the insider's duty"; "[a]bsent a breach by the insider, there is no derivative breach," and thus no violation of §10(b) by anyone. *Dirks*, 463 U.S. at 659, 662.

Moreover, the government had to prove not only that Maher received a pecuniary benefit (which it could not prove), but also Salman's knowledge of such a benefit, because the defendant must be aware of the facts that supposedly make his conduct criminal. *See, e.g., Staples v. United States*, 511 U.S. 600, 605 (1994). *Dirks* requires proof that the tippee "knowingly participate[d]" in the insider's fraudulent fiduciary breach. 463 U.S. at 659-60; *see Newman*, 773 F.3d at 447-50. Since there was no pecuniary benefit, there was nothing for Salman to know.

Nor can the conspiracy count save the conviction. Conspiracy is an agreement "to commit an[] offense against the United States." 18 U.S.C. §371. If the personal benefit test requires proof that the insider disclosed information in exchange for pecuniary gain, there was no offense against the United States, since Maher undisputedly neither sought nor obtained any pecuniary gain. A conspiracy conviction cannot stand if the alleged object of the conspiracy was not a crime. *Parr v. United States*, 363 U.S. 370, 393 (1960); *see also Ocasio*, slip op. at 5 ("conspiracy is a joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of [the underlying substantive] criminal offense'") (brackets in original; citation omitted).

B. Even if the Court does not adopt the pecuniary gain standard for the personal benefit requirement, it should reverse Salman's conviction, because he had no involvement, directly or indirectly, in any breach of fiduciary duty by Maher. Unlike Maher, Salman had no duty to Citigroup or

its clients. Unlike Michael, he did not induce or participate in any way in inducing Maher's disclosures to Michael. He did not aid and abet or conspire with Maher, who never suspected that his brother was relaying information to others. JA.131. In fact, any crime Maher committed was complete *before* Salman learned of the information, when Michael traded on the information for his own account. *See* JA.262-63, 276.

Section 10(b) should not be applied to remote tippees who do not directly participate in the insider's breach of duty or substantially assist a tippee who does. The statute only proscribes deception and manipulation. The theory in the case law is that some insider trading is covered because it amounts to deception in violation of a fiduciary duty to the securities issuer and its shareholders, not the investing public. *Dirks*, 463 U.S. at 654; *Chiarella*, 445 U.S. at 227-28; *cf. O'Hagan*, 521 U.S. at 652 (misappropriation involves breach of duty to source of information). But Salman did not *deceive* anyone. He made no false statements in connection with his trades; he had no duty to the issuers or their shareholders that could have made his silence deceptive. *See Chiarella*, 445 U.S. at 227-28.

This Court has never considered the potential liability of a remote tippee like Salman, and the *Dirks* Court never suggested that remote tippees who did not participate in the tipper's breach would be liable. On the contrary, the Court said there was a need for a ban on only "some tippee trading," and emphasized that the duty to refrain or disclose was "extraordinary." 463 U.S. at 657, 659. In explaining

who was covered, the Court held that "the transactions of those *who knowingly participate with the fiduciary in such a* breach are 'as forbidden' as transactions 'on behalf of the trustee himself.'" *Id.* (emphasis added; citation omitted). This suggests direct participation, as occurs with the immediate tippee, and belies any intent to cover anyone downstream who later receives the information. *See also* Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-*Chiarella *Restatement*, 70 CAL. L. REV. 1, 28 (1982) (*Chiarella* "require[es] some co-venture between the tipper and tippee before that breach can be attributed to the nonfiduciary tippee," which "suggests a very narrow class of tippee-trading cases that fall within the prohibition").

The Court should therefore decline to extend the judge-made tipping crime to remote tippees like Salman—just as the Court refused to expand the scope of the private §10(b) action in *Blue Chip Stamps*, *Central Bank*, and their progeny. *See, e.g.*, *Central Bank*, 511 U.S. at 177-78 (Court cannot "amend [§10(b)] to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute"); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (Court "'must give 'narrow dimensions...to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'") (citations omitted); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202 (2013) ("We have no warrant to encumber securities-fraud litigation by adopting an atextual requirement...that

Congress, despite its extensive involvement in the securities field, has not sanctioned.").

This case well illustrates how expanding the implied tipping crime can lead to incongruous results that defy the theoretical underpinings of tippee liability. Because the tippee's duty and liability are "solely derivative" of the insider's, a tippee cannot "be said to be as culpable as one whose breach of duty gave rise to that liability in the first place." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 312-13 (1985). The tipper is always most culpable because the tipper's conduct causes the violation. *See Dirks*, 463 U.S. at 659. *See also id.* n.23 (tippers are "'most directly culpable in a violation'") (citation omitted). Both the SEC and the district court found that the tipper here was not very culpable and deserved lenience. *See supra* at 5. Under the theory of derivative liability, Salman was necessarily even less culpable. Yet Maher was sentenced to three months' of home confinement, whereas Salman was sent to prison for three years.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

JOHN D. CLINE
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery Street
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

Counsel for Petitioner
Bassam Yacoub Salman

May 6, 2016

STATUTORY APPENDIX

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of life, liberty, or property, without due process of law....

U.S. CONST. amend. V

Section 10(b) of the Securities Exchange Act of 1934 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange...
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. §78j(b).

Securities and Exchange Commission Rule 10b–5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security

17 C.F.R. §240.10b–5.

Section 32(a) of the Securities Exchange Act of 1934 provides in relevant part:

> Any person who willfully violates any provision of this chapter...or any rule or regulation thereunder the violation of

> which is made unlawful or the observance of which is required under the terms of this chapter...shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. §78ff(a).

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
ROSS B. GOLDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ANNE K. SMALL
General Counsel
SANKET J. BULSARA
Deputy General Counsel
MICHAEL A. CONLEY
Solicitor
JACOB H. STILLMAN
Senior Advisor to the Solicitor
DAVID D. LISITZA
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether, under *Dirks* v. *SEC*, 463 U.S. 646 (1983), a tipper personally benefits, and thereby breaches his fiduciary duty, by disclosing confidential information to a tippee as a gift for use in securities trading.

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OPINIONS BELOW

The court of appeals' published opinion (Pet. App. 1-17) is reported at 792 F.3d 1087, and its memorandum (Pet. App. 18-25) is reprinted at 618 Fed. Appx. 886. The order of the district court (Pet. App. 34-52) is available at 2013 WL 6655176.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2015. A petition for rehearing was denied on August 13, 2015 (Pet. App. 53). The petition for a writ of certiorari was filed on November 10, 2015, and was granted on question 1 only on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are reproduced in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and securities fraud, in violation of 15 U.S.C. 78j(b) (2006) and 15 U.S.C. 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. Am. Judgment 1. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $738,539.42 in restitution. *Id.* at 2-3, 5. The court of appeals affirmed. Pet. App. 1-25.

1. a. In 2002, Maher Kara (Maher) joined the healthcare investment banking group at Citigroup, where he worked as a vice president and later as a director. Pet. App. 4; see J.A. 47, 67-68. In those roles, he handled highly confidential information about mergers and acquisitions involving Citigroup clients. Pet. App. 4.

Citigroup had policies and procedures, and implemented "very regular" trainings, to ensure that Maher and other investment bankers kept that information confidential. J.A. 71; see J.A. 35-39, 41-47, 49-51, 54-56, 71-78, 100-101. Maintaining confidentiality was important both to the "reputation" of Citigroup itself and to the business interests of its clients. J.A. 42; see J.A. 41-43, 55-56. For instance, if a Citigroup client sought to acquire another company, and Citigroup personnel leaked news of the planned purchase, that leak could increase the target company's

stock price and make the acquisition more expensive and difficult. See J.A. 39-53, 70-76, 171-173.

Maher has an older brother named Mounir Kara, also known as Michael (Michael). The brothers were extremely close. Pet. App. 4-7; see, *e.g.*, J.A. 158, 195, 215-217, 320-323. Michael helped pay Maher's business-school tuition, was the best man and "stood in for their deceased father at Maher's wedding," and taught Maher basic science to aid him in his work. Pet. App. 6; see, *e.g.*, J.A. 89-91, 104-107, 174-175, 195, 217-218. Maher cared for his brother as Michael struggled to cope with their father's death in 2004. See, *e.g.*, J.A. 90-91, 146-147, 263-264.

After Maher joined the healthcare group at Citigroup, he "began to discuss aspects of his job" with Michael. Pet. App. 4. At first, the discussions were fairly general. J.A. 79-81. But they eventually became more specific and focused on particular companies about which Maher had confidential knowledge, and "Maher began to suspect that Michael was trading on the information," although "Michael initially denied it." Pet. App. 4; see J.A. 80-81, 84-85.

Ultimately, "Michael became more brazen and more persistent in his requests for inside information, and Maher knowingly obliged." Pet. App. 4. From late 2004 to 2007, Maher conveyed to Michael highly confidential corporate information—in particular, information about pending mergers and acquisitions—to which Maher had access through his work at Citigroup, and did so with the understanding that Michael was using that information to make securities trades. *Ibid.*; see, *e.g.*, J.A. 57, 78-83, 97-98, 115-125, 247-248, 277-279, 295-296, 309-313; see also J.A. 82-83 (Maher "fully expected" Michael was trading on the

information); J.A. 299-301 (Maher tells Michael "[y]ou may want to take a position in" an upcoming acquisition).

Maher testified that he tipped Michael "with the intent that [Michael] benefit from information about companies or stocks" and "knew" the information "would benefit" Michael. J.A. 57; see J.A. 80-82 (Maher explaining that he tipped Michael "to get him off my back, and to benefit him"). Maher, in his own words, "knowingly, willfully acted to benefit [his] brother," J.A. 119, and he did so to "fulfill[] whatever needs [Michael] had," J.A. 82; see J.A. 118-119 (Maher testifies "[i]t would benefit [Michael], and benefit me directly"). On one occasion in 2007, for example, Michael called Maher asking for a "favor" and for "information"; when Michael refused Maher's offer of money, Maher, worried about "what [Michael] had done," tipped him about an upcoming acquisition of a company called Biosite. J.A. 124-128; see Pet. App. 6; J.A. 309-314, 331-333; see also J.A. 124 (Michael told Maher "I owe somebody" and "Please, I need this"). Although Maher regretted that tip and asked Michael not to trade, Maher thought that Michael "was going to trade on [the information]." J.A. 125; see J.A. 165.

As Michael testified, Maher's information gave Michael an extraordinary trading advantage. It "provide[d] * * * [him] timely information that the average person does not have access to" and "would never have or dream of" having. J.A. 250-251; see J.A. 192-193. To avoid detection, Maher often purposely tipped Michael about acquisitions on which Maher himself was not directly working, in an attempt to make it more difficult to trace the information back to Maher,

and the brothers used code words in their emails. J.A. 116-118, 124-125, 128-131, 226-248.

b. In 2003, Maher became engaged to marry petitioner's sister. Pet. App. 4. The Kara and Salman families—and Michael and petitioner in particular—formed a warm relationship. *Id.* at 4-5; see, *e.g.*, J.A. 60-62, 85-86, 106-107, 133-138, 283-286. As Michael explained at trial, he and petitioner "[a]bsolutely" became friends. J.A. 223.

Late in 2004, Michael began sharing with petitioner (and others) the inside information that he obtained from Maher. Pet. App. 5; see J.A. 130-131, 266-280; see also J.A. 257-259 (Michael testifies that when information about "a major deal" came from Maher, petitioner was "first on [Michael's] phone list"). Michael also encouraged petitioner to trade on that information, as Michael himself was doing. Pet. App. 5; see J.A. 254-259.

Petitioner followed that advice. See, *e.g.*, J.A. 262-263, 276, 357-358 (petitioner executed same trades as Michael). But although petitioner had his own brokerage account, J.A. 366, he did not use it to make the trades. Rather, petitioner "arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk." Pet. App. 5; see, *e.g.*, J.A. 318, 349-358. Petitioner conveyed the inside information to Bayyouk, who executed the trades, and the two split the profits—an amount that ultimately totaled more than $1.5 million. Pet. App. 5, 19; see, *e.g.*, J.A. 349-357 (petitioner used $300,000 for down payment on house).

Nearly $1 million of those profits came from Maher's tip to Michael in 2007 that Biosite was about to

be acquired by a Citigroup client. J.A. 52-54, 122-128; 9/17/13 Tr. 335, 341, 456-465; 9/24/13 Tr. 1510-1511. Within hours of the tip, Michael called petitioner, who called Bayyouk, and Bayyouk bought over $100,000 of Biosite options. J.A. 309-313, 365-366; 9/25/13 Tr. 1571-1576, 1657. The acquisition was publicly announced before the next trading day, 9/17/13 Tr. 344—and that announcement caused the price of Biosite stock to increase significantly, thus allowing petitioner and Bayyouk to realize an overnight windfall. 9/18/13 Tr. 675-678; see 9/25/13 Tr. 1568-1569; see also 9/24/13 Tr. 1423-1424 (Bayyouk lied to SEC about Biosite trades). Petitioner then paid Michael a kickback of approximately $10,000 to thank him for the information on Biosite and other companies. J.A. 317-318; 9/23/13 Tr. 1140-1142.

c. Petitioner "knew full well that Maher Kara was the source of the information" that formed the basis for those trades. Pet. App. 5. Petitioner, who had experience trading securities, J.A. 346-347, was aware that Maher worked as an investment banker at Citigroup, see, *e.g.*, J.A. 88, 104, 106-107, 222-224, 377-378. Because petitioner was risking hundreds of thousands of dollars, he wanted to "know how solid [Michael's] information was." J.A. 340; see J.A. 339. It was also important to Michael that petitioner know that Maher was the tipper; Michael hoped it would make Maher seem more powerful and prosperous in the eyes of the Salman family. See J.A. 257-260.

Accordingly, Michael repeatedly informed petitioner that "Maher is the source of all of this information." J.A. 286; see J.A. 256-257 (petitioner "[d]irect[ly]" asked Michael where the inside information came from, and Michael responded "Maher"); see also Pet.

App. 5; J.A. 252-253, 265-266, 382-383. In one instance, Michael told petitioner that he would "check with Maher" to learn when a target corporation was likely to be acquired. J.A. 300-302.

Petitioner also knew that Maher's disclosures were illicit. In 2005, Michael saw papers on petitioner's desk relating to the trading and angrily warned petitioner to be careful with the information "because it was coming from Maher." Pet. App. 5-6; see J.A. 284-286. Petitioner agreed on the need to "protect" Maher and offered to shred the papers. Pet. App. 6; see J.A. 284-287.

Finally, petitioner knew about the close relationship between Maher and Michael. Pet. App. 6. The Kara and Salman families were intertwined, and petitioner "would have had ample opportunity to observe Michael and Maher's interactions at their regular family gatherings." *Ibid.* For example, petitioner attended Maher's wedding, where Michael brought Maher to tears by giving a toast describing "how he spoke to [Maher] nearly every day" and explaining that Maher was "his 'mentor,' his 'private counsel,' and 'one of the most generous human beings he knows.'" *Id.* at 6-7; see J.A. 155-159.

2. a. Petitioner was charged with four counts of securities fraud and one count of conspiracy to commit securities fraud. J.A. 389, 392; Pet. App. 35-36.

The district court instructed the jury that petitioner could be found guilty of securities fraud only if the government established beyond a reasonable doubt that petitioner "willfully used a device or scheme to defraud someone or engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person." J.A. 393; see J.A.

394 (instructing that "'[w]illfully' means intentionally undertaking an act for the wrongful purpose of defrauding or deceiving someone"). The court also instructed the jury that to establish that petitioner engaged in such fraud or deceit the government had to prove beyond a reasonable doubt that (1) the insider, Maher, "intentionally breached [a] duty of trust and confidence" owed to his employer or its clients "by disclosing confidential, material, non-public information" and by "personally benefit[ting] in some way, directly or indirectly," from that disclosure; and (2) petitioner knew that he was trading on the basis of inside information and that the information had been improperly disclosed by Maher for "personal benefit." J.A. 396-397; see J.A. 393-395.

The district court instructed the jury that "[p]ersonal benefit includes not only monetary gain * * * but also a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature." J.A. 398-399. Petitioner did not object to that instruction. Compare 11-cr-625 Docket entry No. 191, at 7, with J.A. 398-399.

b. The jury found petitioner guilty on all counts. Pet. App. 7. Petitioner moved for a new trial, arguing (among other things) that the government adduced insufficient evidence that petitioner knew that Maher personally benefited. *Id.* at 34, 49. The district court denied the motion. *Id.* at 47-52. The court noted the "substantial" evidence of petitioner's knowledge, including the steps petitioner took to hide his trading to "protect" Maher and petitioner's awareness that Mi-

chael and Maher "were brothers with a very close relationship." *Id.* at 50-52.

3. The court of appeals affirmed. Pet. App. 1-25. The court rejected petitioner's argument, based on the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied, 136 S. Ct. 242 (2015), that "the evidence was insufficient to find either that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that [petitioner] knew of such benefit." Pet. App. 9.

The court of appeals explained that, under this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983), a "tippee" who receives confidential inside information is liable if "the insider personally will benefit, directly or indirectly, from his disclosure" and "the tippee knows or should know that there has been such a breach" of fiduciary duty. Pet. App. 11 (brackets omitted) (quoting *Dirks*, 463 U.S. at 660, 662). The court emphasized *Dirks*'s recognition that an insider personally benefits from disclosing confidential information when he "makes a gift of confidential information to a trading relative or friend." *Id.* at 12 (emphasis omitted) (quoting *Dirks*, 463 U.S. at 664). And the court found that "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." *Ibid.* (quoting *Dirks*, 463 U.S. at 664).

In ruling that petitioner had knowledge of the personal benefit, the court of appeals noted Michael's testimony "that he directly told [petitioner] that it was Michael's brother Maher who was, repeatedly, leaking the inside information that Michael then conveyed to

[petitioner], and that [petitioner] later agreed that they had to 'protect' Maher from exposure." Pet. App. 12. The court stated that, given "the Kara brothers' close relationship, [petitioner] could readily have inferred Maher's intent to benefit Michael." *Ibid.*; see *id.* at 25. Accordingly, the court concluded, "there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that [petitioner] knew as much." *Id.* at 12.

The court of appeals rejected petitioner's argument that "because there is no evidence that Maher received any * * * tangible benefit [of a pecuniary or similarly valuable nature] in exchange for the inside information, or that [petitioner] knew of any such benefit, the Government failed to carry its burden." Pet. App. 15. "To the extent [the Second Circuit's decision in] *Newman* can be read to go so far," the court stated, that decision would "depart from the clear holding of *Dirks*." *Id.* at 15-16 (citing *Dirks*, 463 U.S. at 664).

Finally, the court of appeals noted that the evidence of securities fraud in this case was strong and direct. Pet. App. 17. Because Maher "testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother Michael," the court observed, "the evidence that Maher Kara breached his fiduciary duties could not have been more clear." *Id.* at 16; see, *e.g.*, *ibid.* ("the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information"); *id.* at 17 ("jury had more than enough facts" to conclude that Maher "knew that there was a potential (indeed, a virtual certainty) that Michael would

trade on" the inside information Maher provided). If such evidence were insufficient to establish a violation of the securities laws, the court concluded, "a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return." *Id.* at 16.

SUMMARY OF ARGUMENT

Under *Dirks* v. *SEC*, 463 U.S. 646 (1983), a tippee of confidential information from a corporate insider can be liable for securities fraud when the insider has personally benefited, in breach of his fiduciary duty, by disclosing the information for securities trading. *Dirks* made clear that the requisite personal benefit exists not only when the insider will reap a pecuniary gain from disclosure, but also when "an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664.

The essential quality of a gift of confidential corporate information—and the reason why a gift of such information for trading breaches the insider's fiduciary duty—is that it serves personal, not corporate, purposes. Thus, when the objective facts show that information was provided as a gift for securities trading, and no corporate purpose exists for the disclosure, the personal-benefit test is satisfied. Personal gifts, of course, inherently provide tangible and intangible benefits to the giver, and personal benefit is particularly clear when an insider gives information for trading to a close friend or relative. That is doubtless why *Dirks* gave those instances as exemplars of gift liability. But courts need not inquire into the nature or closeness of any relationship between the in-

sider who makes a gift of confidential information and his beneficiary.

Dirks's pronouncement about gifts has governed the securities markets for more than three decades. And Congress has endorsed that holding by repeatedly amending the insider-trading laws in ways that build on this Court's insider-trading decisions without alteration. Nothing justifies paring back those settled standards.

Petitioner nevertheless invites this Court to upend insider-trading law. He first asks the Court to repudiate insider-trading liability. Br. 21-24. Alternatively, he would rewrite *Dirks* to require proof that an insider provided a tip "in exchange for pecuniary gain" to trigger liability, thus eliminating gift liability. Br. 19. This Court should reject those contentions.

The proscription of insider trading under Section 10(b) and Rule 10b-5 targets a well-recognized form of deception in connection with securities transactions. It does not reflect judge-made law unmoored from the text of the statute. And petitioner's claim that *Dirks* should be revised to require that a tipper obtain a "pecuniary gain" is fundamentally unsound. *Dirks* expressly held that a tipper breaches his fiduciary duty by providing information for trading *both* when he expects "pecuniary gain" *and* when he "makes a gift." 463 U.S. at 663-664. Petitioner makes scant effort to grapple with the language of *Dirks*, let alone refute the Court's logical and common-law basis for treating gifts of confidential information as breaching the insider's fiduciary duty and harming both the corporation and its shareholders.

Instead, petitioner mischaracterizes gift liability to suggest that it is impermissibly vague or overbroad.

Neither suggestion has merit. The line between a corporate purpose and a personal one is readily intelligible to courts and citizens and was selected by *Dirks* precisely to provide necessary guidance. An insider's gift of confidential information falls on the personal side of the line. And the requirement to prove scienter is an additional strong safeguard. See *United States* v. *O'Hagan*, 521 U.S. 642, 665-666 (1997). Experience confirms the workability and necessity of the *Dirks* principle.

Petitioner's "pecuniary gain" limitation would seriously harm investors and damage confidence in the fairness of the nation's securities markets. Favored tippees could reap instant, no-risk profits at the expense of stockholders, free from securities-law liability. Such trading, which would likely proliferate, would undermine a core purpose of the securities laws: to "eliminate the idea that use of inside information for personal advantage is a normal emolument of corporate office." *Dirks*, 463 U.S. at 653 n.10.

Applying the proper test, petitioner's convictions should be affirmed: he knowingly traded on the basis of information that he knew an insider disclosed for no corporate purpose, but instead as a personal gift to the insider's brother for trading. Petitioner knowingly exploited that breach of fiduciary duty in trading and thus violated the securities laws.

ARGUMENT

A CORPORATE INSIDER'S GIFT OF CONFIDENTIAL CORPORATE INFORMATION FOR USE IN SECURITIES TRADING VIOLATES THE SECURITIES LAWS

A. *Dirks*'s Personal-Benefit Standard Encompasses A Tipper's Gift Of Confidential Information For Use In Trading

1. The Dirks *framework governs tipping cases*

a. Congress enacted the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, to "insure honest securities markets and thereby promote investor confidence." *United States* v. *O'Hagan*, 521 U.S. 642, 658 (1997); see 15 U.S.C. 78b. Section 10(b) of the Exchange Act makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. 78j(b). The SEC's Rule 10b-5, which implements Section 10(b), forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates * * * as a fraud or deceit." 17 C.F.R. 240.10b-5.

A corporate insider violates the antifraud provisions of Section 10(b) and Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, nonpublic information." *O'Hagan*, 521 U.S. at 651-652. Under the "classical" theory, such trading "qualifies as a 'deceptive device'" within the meaning of Section 10(b) because it violates the "relationship of trust and confidence" that exists "between the shareholders of a corporation and those insiders who have

obtained confidential information by reason of their position with that corporation." *Id.* at 652 (citation omitted). To avoid deceiving "uninformed . . stockholders," a corporate insider in possession of such information must either publicly "disclose" it or "abstain from trading." *Ibid.* (citation omitted). And "a corporate 'outsider'" can be held liable for the misappropriation of material, nonpublic information from its lawful possessor, if the outsider acts deceptively by pretending loyalty while breaching a duty he owes to the "source of the information." *Id.* at 652-653.[1]

b. In *Dirks* v. *SEC*, 463 U.S. 646 (1983), this Court addressed the scope of "tipper-tippee" insider-trading liability—that is, liability that arises from an insider's disclosure of confidential corporate information to others who "exploit[]" it in trading. *Id.* at 659, 664. An ex-officer at Equity Funding of America told Dirks, a broker-dealer, that the company's assets were "vastly overstated as the result of fraudulent corporate practices." *Id.* at 649. Dirks investigated by speaking to present and former employees who corroborated the fraud; he urged a Wall Street Journal reporter to publish a story on it; and he "openly discussed the information he had obtained with a number of clients and investors," some of whom then sold

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[1] The personal-benefit analysis is the same under both the "classical" and "misappropriation" theories of insider trading, see *O'Hagan*, 521 U.S. at 651-652, and the facts of this case can be analyzed under both theories—*i.e.*, Maher misappropriated information in violation of a "duty of trust and confidence" owed to Citigroup and its clients, *id.* at 652-653, and Maher was a corporate advisor who, while not actually an insider, became a "fiduciar[y] of the shareholders" of those clients, *Dirks* v. *SEC*, 463 U.S. 646, 655 & n.14 (1983). This brief's references to "insiders" should be read to include misappropriators.

their holdings in the corporation's securities. *Id.* at 649-650. Although Dirks's efforts ultimately sparked public exposure of the fraud, the SEC censured him for aiding and abetting violations of Rule 10b-5 "by repeating the [fraud] allegations" to the sellers. *Id.* at 651; see *id.* at 649-650, 652 n.8.

In an opinion by Justice Powell, this Court held that Dirks had not violated the securities-fraud laws. The Court disapproved the broad theory, which it viewed as implicit in the SEC's censure of Dirks, "that the antifraud provisions" always "require equal information among all traders." 463 U.S. at 657; see *id.* at 654-655; see also *Chiarella* v. *United States*, 445 U.S. 222, 232 (1980) (explaining that "the element required to make silence fraudulent" in securities transactions is "a duty to disclose"). Nevertheless, the Court confirmed, a corporate insider violates Rule 10b-5 when he possesses information "intended to be available only for a corporate purpose and not for the personal benefit of anyone," and "take[s] advantage of that information by trading without disclosure." 463 U.S. at 653-654 (citations omitted). That action violates the insider's fiduciary duty to shareholders. *Id.* at 654. And, the Court held, "[t]he need for a ban on some tippee trading is clear." *Id.* at 659; see *ibid.* (noting that it is unlawful for an insider "to do indirectly," through disclosing inside information to "'any other person,'" what the insider cannot do directly) (quoting 15 U.S.C. 78t(b)). The Court explained that a tippee's duty is "derivative from * * * the insider's duty"—that is, "a tippee assumes a fiduciary duty * * * when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the

tippee and the tippee knows or should know that there has been a breach." *Id.* at 659-660.

In determining whether an insider has breached his duty, the Court stated, the relevant question "is whether the insider personally will benefit, directly or indirectly, from his disclosure." 463 U.S. at 662. To identify such a breach of duty, the Court wrote, decisionmakers must "focus on objective criteria," and "[t]here are objective facts and circumstances that often justify such an inference." *Id.* at 663-664. "For example," the Court observed, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention" on the part of the insider "to benefit the particular recipient." *Id.* at 664; see *id.* at 663 (describing "pecuniary gain or a reputational benefit that will translate into future earnings" as forms of personal benefit). In addition, "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend," a situation in which "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* at 664; see *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 311 n.21 (1985) (endorsing *Dirks*'s gift language).

Applying that test, the Court found no violation by Dirks because the insiders did not breach their duty to shareholders. 463 U.S. at 662, 665; see *id.* at 667. The "tippers were motivated by a desire to expose the fraud," and they "received no monetary or personal benefit for revealing Equity Funding's secrets, nor was their purpose to make a gift of valuable information to Dirks." *Id.* at 667

2. Dirks's *personal-benefit test is satisfied by disclosure of corporate information without a corporate purpose*

Under *Dirks*, an insider personally benefits from disclosing confidential information for trading when he acts for personal, rather than corporate, reasons. That analysis is confirmed by the basis for *Dirks*'s rule, the examples *Dirks* furnished, and common-law principles.

a. The personal-benefit requirement is a means of "determin[ing] whether the insider's 'tip' constituted a breach of the insider's fiduciary duty" to act in the shareholders' interest. *Dirks*, 463 U.S. at 661; see *id.* at 663 n.23. That duty—which *Dirks* termed the "*Cady, Roberts* duty," see *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961)—is premised on "the existence of a relationship affording access to inside information" that is "intended to be available only for a corporate purpose and not for the personal benefit of anyone" and "the unfairness of allowing a corporate insider to take advantage of that information." 463 U.S. at 653-655 (quoting *Chiarella*, 445 U.S. at 227, and *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S.E.C. 933, 936 (1968) (quoting *Cady, Roberts*, 40 S.E.C. at 912)); see *id.* at 655 n.14 (stating that "outsiders may become fiduciaries of the shareholders" when "given access to information solely for corporate purposes").

An insider who trades for himself on material, nonpublic information inherently acts contrary to a corporate purpose, to the detriment of shareholders. That trading is a breach of his fiduciary duty. The same is true when an insider, while not trading himself, provides the information to a tippee for that person to

trade. See *Dirks*, 463 U.S at 659, 663. As *Dirks* emphasizes, "[n]ot only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Id.* at 659 (citing 15 U.S.C. 78t(b)). Either situation places the insider's personal interests above his fiduciary duty to shareholders and involves the same unfairness. And both situations are characterized by the same feature: the absence of any corporate purpose for acting, and the consequent inference of personal benefit.

The existence of a corporate purpose for disclosing confidential information indicates that a tipper is acting within the bounds of the applicable duty. As *Dirks* explained, "[a]ll disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders." 463 U.S. at 661-662. For example, in certain circumstances, disclosure may be made for the very purpose of serving the shareholders' (or a client's) interests. *Id.* at 662 n.22 (example of disclosure to representative of another corporation in confidential "negotiations" for possible "takeover"). And a disclosure of material information also may be made mistakenly in the course of carrying out appropriate corporate functions. *Id.* at 662.

The existence of "personal benefit" is simply the flip side of the absence of a corporate purpose. *Dirks* expressly contrasted a personal benefit with a corporate purpose, treating them as opposite sides of the same coin. 463 U.S. at 653-654. As noted, the personal-benefit language in *Dirks* is drawn directly from *Cady, Roberts*, which recognized that confidential

corporate information is "available only for a corporate purpose and not for the personal benefit of anyone." *Id.* at 654 (citation omitted). In that formulation, information can be used either for a corporate purpose or for a personal benefit, and so a personal benefit exists when a corporate purpose does not. See *Webster's New International Dictionary* 1828 (2d ed. 1957) (*Webster's*) (definition of "personal" includes "peculiar or proper to private concerns; not public or general"); cf. *FCC* v. *AT&T Inc.*, 562 U.S. 397, 404 (2011) ("personal," characteristically, "mean[s] precisely the *opposite* of business related"). Similarly, *Dirks* states—again quoting *Cady, Roberts*—that "[a] significant purpose of the Exchange Act was to eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office." 463 U.S. at 653 n.10 (quoting 40 S.E.C. at 912 n.15). That language reinforces *Dirks*'s core precept: acting for a corporate purpose is consistent with a corporate officer's or employee's fiduciary responsibilities, while using corporate information for personal advantage or benefit is not. See *id.* at 663 (emphasizing that "objective criteria" will distinguish acting for "legitimate business justification" from "direct or indirect personal benefit").

b. That a tipper personally benefits when acting for a personal, rather than corporate, purpose in giving a tippee confidential information for trading is borne out by the specific examples of personal benefit that *Dirks* gives as well as by the result in that case.

Dirks states that an inference of personal benefit arises when a tip is part of a *quid pro quo* in which the insider receives "pecuniary gain" or a "reputational" boost. 463 U.S. at 663. A tipper providing infor-

mation to receive such a return is plainly acting not for a corporate purpose but for a personal one. *Dirks* also says that a personal benefit "exist[s] when an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664. In that circumstance, as well, the insider acts for a personal purpose and—given that the tip is a "gift" precisely because the tipper understands that the tippee intends to trade on the information and make money from it—sets a third party against the shareholders' interests.

The outcome in *Dirks* reflects that analysis. The tippers in *Dirks* acted consistent with the shareholders' interests. See 463 U.S. at 666-667. They did not "violate[] their *Cady, Roberts* duty to the corporation's shareholders by providing information to *Dirks*"; they were "motivated by a desire to expose the [corporate] fraud," and that exposure was ultimately for the shareholders' benefit (even if a recipient might have used the information to their short-term "disadvantage"). *Id.* at 666-667 & n.27. Because the insiders did not breach their duties by acting for a personal purpose, such as a "purpose to make a gift of valuable information," *id.* at 667, the tippee (Dirks) had no derivative securities-fraud liability.

c. The rule that an insider violates his fiduciary duty under *Dirks* by disclosing information for the non-corporate purpose of enabling the tippee to trade —and thus profit at the expense of the shareholders (or the source of the information)—accords with the common law. See, *e.g.*, 463 U.S. at 653 n.10, 660 n.20 (drawing on agency law and corporate law); *O'Hagan*, 521 U.S. at 653 (agency law and embezzlement law); *Chiarella*, 445 U.S. at 227-228 & n.10 (corporate law and other common law). In the corporate context,

specified fiduciaries must act for the "benefit of all the shareholders" and "solely in the interest of the corporation," rather than for their own "self-interest and self-protection." 3 *Fletcher Cyclopedia of the Law of Corporations* § 848, at 238-239 (2010); see *id.* § 837.60, at 201 (stating that the "best interest of the corporation and its shareholders take precedence over any interest possessed by" certain fiduciaries "and not shared by the shareholders generally"); see also *United States* v. *Byrum*, 408 U.S. 125, 142 (1972) (certain fiduciaries may not misuse position "for personal or family advantage to the detriment of the corporation or other stockholders"). And in the agency context, "an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal * * * in competition with or to the injury of the principal, on his own account or on behalf of another." Restatement (Second) of Agency § 395 (1958); see Restatement (First) of Agency §§ 387 cmt. b, 395 (1933); Floyd R. Mechem, *Outlines of the Law of Agency* § 297, at 190 (3d ed. 1923) (agent may not "promote his own or some other person's interest at the expense of the principal's").

Similarly, in the law of embezzlement—which this Court has closely analogized to insider-trading law, see *O'Hagan*, 521 U.S. at 653-654—a person may not "appropriat[e] to [his] own use" money or property that has been "entrusted" to him by another, *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) (quoting *Grin* v. *Shine*, 187 U.S. 181, 189 (1902)). That conduct remains unlawful even if the person who takes the property for his own use fails to retain it for himself or to realize any profit from it. See, *e.g.*, *Republic of Iraq* v. *ABB AG*, 768 F.3d 145, 166 (2d Cir. 2014) (em-

bezzlement occurs "where the insider's misconduct benefits only himself or a third party"), cert. denied, 135 S. Ct. 2836 (2015). The critical factor is the embezzler's use of the property—here, confidential information—not for the purposes for which it was entrusted, but for the person's own purposes.

3. **Dirks *makes clear that the tipper's understanding that the information will be used for trading by a tippee is critical to liability***

Securities fraud requires more than simple breach of fiduciary duty. *Dirks*, 463 U.S. at 653-654 & n.10. Unlawful tipping "deceives, manipulates, or defrauds," *id.* at 663 (citation and brackets omitted), only when the insider breaches his fiduciary duty by disclosing inside information to a favored person, and does so knowing or expecting that the information will be used for securities trading. That act violates an insider's duty not to deceive and harm the corporation or shareholders by acting "against" their "interests" with respect to securities transactions. *Bateman Eichler*, 472 U.S at 311 n.21; see *O'Hagan*, 521 U.S. at 653-654. The insider's knowledge that a tippee will "exploit[]" the confidential information in trading is thus critical to finding securities fraud. 463 U.S. at 664 (referring to "elements of fiduciary duty *and* exploitation of nonpublic information") (emphasis added).[2]

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[2] The insider's disclosure of information without knowledge that the tippee will trade may result in liability for a trading *tippee* under the misappropriation doctrine. Cf. 17 C.F.R. 240.10b5-2 (clarifying rules under the misappropriation doctrine when a tippee misuses information that was not disclosed to him for purposes of trading). But the tipper will not be liable under Rule 10b-5 absent the requisite degree of awareness of the likelihood of trading.

Accordingly, "the government must prove" that "the tipper conveyed material nonpublic information to his 'tippee' with the understanding that it would be used for securities trading purposes." *United States* v. *Gansman*, 657 F.3d 85, 92 (2d Cir. 2011). The tipper's understanding that the tippee will use the confidential information for trading is relevant to various elements of liability under Section 10(b) and Rule 10b-5. In addition to speaking to the existence of the relevant breach of duty, and the resulting deception necessary to establish fraud, see *Dirks*, 463 U.S. at 664; *O'Hagan*, 521 U.S. at 653-655, it is relevant to whether the deception is in connection with trading in securities, see 15 U.S.C. 78j; *O'Hagan*, 521 U.S. at 655-656, as well as to whether a defendant acted with the requisite scienter by possessing the "intent to deceive, manipulate, or defraud," *Dirks*, 463 U.S. at 663 n.23 (citation omitted).

4. A tipper personally benefits by giving a gift of information for trading

Under the *Dirks* framework, a gift of information for trading intrinsically involves a personal benefit.

a. *Dirks* expressly states that a gift of confidential information for trading satisfies the requirement that the tipper personally benefit. See 463 U.S. at 662-664; see also *Bateman Eichler*, 472 U.S at 311 n.21 (repeating gift language from *Dirks*). That is so for several reasons. As *Dirks* emphasizes, a gift of information with the expectation that the recipient will convert it into cash is functionally equivalent to "trading by the insider himself followed by a gift of the profits to the recipient." 463 U.S. at 664. Given the close equivalency between such trading and a gift of information, it would make "scant sense" to find that the insider

had breached his duty in one situation but not the other. *O'Hagan*, 521 U.S. at 659 (making same point in adopting misappropriation theory as counterpart to classical insider-trading theory).

In order for a gift of information to trigger liability, the government need not show that the insider personally profited (or expected to) in a financial sense. The point of a gift is to transfer something of value without a *quid pro quo*. See *Webster's* 1056 (defining "gift" as "anything voluntarily transferred * * * without compensation"). Thus, if the evidence establishes that the insider gave a gift of information for trading and that a business justification for the disclosure is absent, the factfinder need not investigate the exact nature of the personal reasons that drove the tipper to decide to confer such a gift. See *SEC* v. *Maio*, 51 F.3d 623, 633 (7th Cir. 1995) ("Absent some legitimate reason for [the tipper's] disclosure, * * * the inference that [the] disclosure was an improper gift of confidential corporate information is unassailable. After all, he did not have to make any disclosure, so why tell [the tippee] anything?").

Liability for giving a gift of information is further compatible with a personal-benefit standard because insiders who make a gift of information for trading may benefit in tangible or intangible ways. A tipper who gives a gift of confidential information for trading can save money if he intended to provide funds to the tippee anyway; passing the information does not cost the tipper anything out of pocket. See Pet. App. 6. Instead of giving a household employee a monetary bonus for good performance, for example, a tipper might simply disclose valuable nonpublic information and keep the bonus money. Cf. *SEC* v. *Blackwell*, 291

F. Supp. 2d 673, 692-693 (S.D. Ohio 2003). Similarly, the tipper can fulfill what he sees as an unbreakable social obligation—like supporting an aging parent or a struggling adult child—by providing information for trading. Cf. *CBI Indus., Inc.* v. *Horton*, 682 F.2d 643, 644-647 (7th Cir. 1982) (stating that "[a] person's 'wealth,' in a realistic though not pecuniary sense, is increased by increasing the pecuniary wealth of his children"). And the tipper can give a gift to impress his associates, or because of vanity about his generosity. See Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 348 (1979) (Brudney) (explaining that a giver may obtain "prestige or status or the like"), cited in *Dirks*, 463 U.S. at 663-664. Any suggestion that giving gifts does not confer something of value on the tipper thus would be blind to social and cultural realities.

Because of the variety of motives and rewards from giving a gift of information for trading, however, the personal-benefit requirement properly focuses on whether the tipper is serving a corporate purpose, not on the question of what the gifting tipper obtains for himself from his misuse of information. Accordingly, *Dirks* does not call for a subjective inquiry into whether the tipper received some form of financial or psychic value as a result of his actions. In *Dirks* itself, the Court observed that the giving of a gift in certain circumstances was an "objective" circumstance that would allow the factfinder to infer the requisite personal benefit. 463 U.S. at 663-664. The Court did not suggest that any subjective inquiry into the nature of the giver's motivations or rewards was necessary. See *id.* at 663 ("In determining whether the insider's pur-

pose in making a particular disclosure is fraudulent, the SEC and the courts are not required to read the parties' minds.").

b. Similarly, *Dirks*'s personal-benefit test encompasses a gift to *any* person with the expectation that the information will be used for trading, not just to a "trading relative or friend." 463 U.S. at 664. The Court's use of those examples did not state a limiting principle—and such a principle would have no logical connection to the decision's rationale.

Dirks's reference to a "trading relative or friend" illustrated the Court's point that tipping information for a non-corporate purpose (*i.e.*, a personal one) breaches the relevant fiduciary duty and occasions tipper liability. The context of the discussion made clear the phrase's illustrative purpose. The sentences addressing the "trading relative or friend" appear in a portion of the opinion that is introduced by the words "[f]or example," demonstrating that the particular "objective facts and circumstances" that *Dirks* describes as "justify[ing] * * * an inference" of personal benefit to the tipper are not the exclusive facts and circumstances that can give rise to such an inference. 463 U.S. at 664. Nothing in *Dirks* suggested that those were the only gifts that could count, as opposed to the most likely improper gifts to be made.

Nor would anything in *Dirks*'s logic support a "relative or friend" restriction. A gift of confidential corporate information to an acquaintance, a household employee, or even a stranger is just as unauthorized, and just as contrary to the interests of the corporation and shareholders, as a gift to someone with whom the tipper has a closer relationship. Limiting tipper-tippee liability in gift cases to a subset of recipients

would conflict with *Dirks*'s goal of identifying situations in which a tipper's disclosure of confidential information breaches his fiduciary duty. See, *e.g.*, 463 U.S. at 661-663; see also 18 Donald C. Langevoort, *Insider Trading: Regulation, Enforcement & Prevention* § 4:6 n.14 (2016) (Langevoort) ("The Court's actual phrasing refers to a gift 'to a relative or a friend.' But there is no conceptual reason to limit the category in that fashion.").

The improper nature of a disclosure that lacks any "ostensibly legitimate business justification," *Dirks*, 463 U.S. at 663, may be particularly clear when the insider provides information for trading in a close personal relationship. The facts of this case provide a stark example. And many tipping cases do involve tips to friends or relatives, see Langevoort § 11:9, likely because those are the people for whom a gift-giving tipper may be most moved to act for personal reasons and to violate his duty—and the law. But *Dirks* did not require courts to inquire into whether a particular recipient was a close enough family member to count as a tipper's "relative," or was sufficiently friendly with the tipper to count as his "friend"—and such a rule would serve no valid purpose. Under *Dirks*, a factfinder confronting a gift case involving *any* recipient must simply ask whether the tipper gave the confidential information for a personal reason expecting that it would be used for trading, thus allowing the information to be "exploit[ed]" and deceiving the party that had "repose[d] trust or confidence in him." 463 U.S. at 664-665.

B. *Stare Decisis* And Subsequent Legislation Strongly Support *Dirks*

Principles of *stare decisis* apply with special force here because *Dirks*—and its holding that a tipper personally benefits by giving a gift—has been the law for more than 30 years. And Congress has indicated its endorsement of the principles established in *Dirks*.

1. "[T]his Court does not overturn its precedents lightly," because *stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (citation omitted). In "the area of statutory interpretation," where the "legislative power is implicated," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989), *stare decisis* "carries enhanced force," *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015), because "Congress remains free to alter what [the Court] ha[s] done," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (citation omitted); see *Halliburton Co.* v. *Erica P John Fund, Inc.*, 134 S. Ct. 2398, 2411-2413 (2014).

2. Far from altering this Court's work in interpreting Section 10(b), Congress has repeatedly approved the existing state of the law.

a. Since *Dirks* was decided, Congress has twice amended Section 10(b) without modifying the Court's standard. One of those amendments extended to "security-based swap agreements" the application of "judicial precedents decided under subsection (b) * * * that prohibit fraud, manipulation, or insider

trading," including *Dirks* itself. Pub. L. No. 106-554, 114 Stat. 2763A-454 (2000); see 124 Stat. 1761 (2010).

Congress also enacted other post-*Dirks* laws that build upon existing Section 10(b) precedents. In the Insider Trading Sanctions Act of 1984 (ITSA), Pub. L. No. 98-376, 98 Stat. 1264, Congress created a civil-penalty sanction that the SEC may seek to impose upon anyone found to have tipped or traded on "material nonpublic information" in violation of the securities laws. § 2, 98 Stat. 1264. In the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), Pub. L. No. 100-704, 102 Stat. 4677, Congress increased the criminal penalties for willful violation of the securities laws and created a private cause of action for persons who contemporaneously trade with someone who is violating the securities-fraud laws through trading on "material, nonpublic information." §§ 4-5, 102 Stat. 4680; see §§ 3, 5, 102 Stat. 4677-4681 (joint and several liability in private action and civil penalty in enforcement action for person who "communicat[ed]" inside information). Congress also stated that the SEC's "rules and regulations * * * governing" insider trading are "necessary and appropriate in the public interest and for the protection of investors" and that the SEC has "fairly" enforced those rules "within the limits of accepted * * * judicial construction of such rules and regulations." § 2, 102 Stat. 4677. And in the STOCK Act, Pub. L. No. 112-105, 126 Stat. 291, enacted in 2012, Congress provided that members of Congress, judicial officers, and executive-branch, judicial, and congressional employees "are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) * * * and Rule 10b-5" and are pro-

hibited "from using nonpublic information derived from their official positions for personal benefit." Pmbl., §§ 4, 9, 126 Stat. 291-292, 297-298.

Those post-*Dirks* enactments are premised on existing requirements for securities-fraud liability, including the requirement described in *Dirks*. "Congress hardly could be expected to" augment enforcement of the securities-fraud laws proscribing insider trading as it did after *Dirks* was decided—including by making explicit that those laws applied to the conduct of members of Congress themselves—"if it was dissatisfied with the substantive grounds on which" the government "could bring its actions." Donald C. Langevoort, Commentary, *The Insider Trading Sanctions Act of 1984 and Its Effect on Existing Law*, 37 Vand. L. Rev. 1273, 1274 (1984).

b. The legislative history of several of the relevant provisions also evinces Congress's awareness, understanding, and approval of the state of the law under *Dirks*. For example, the House Report accompanying enactment of ITSFEA explains that "several major court cases in recent years," including *Dirks*, "have established clear boundaries for prosecution of [insider-trading] violations." H.R. Rep. No. 910, 100th Cong., 2d Sess. 9 (1988) (1988 House Report). That Report states that ITSFEA was "not intended to alter in any respect * * * the underlying standards for tipper and tippee liability" that are "set forth in * * * *Dirks*." *Id.* at 19; see *id.* at 11 ("The legal principles governing insider trading cases are well-established and widely-known."). And the House Report accompanying enactment of ITSA discusses *Dirks*, explains that the decision "preserves insider trading liability and expresses a continued, firm disapproval of insider

trading," and concludes that "the law with respect to insider trading is sufficiently well-developed at this time to provide adequate guidance." H.R. Rep. No. 355, 98th Cong., 1st Sess. 13, 15 (1983) (1983 House Report); see *id.* at 13 (warning that "any new definition [of insider trading] which might be adopted would be likely to create new ambiguities"); *id.* at 15 (stating that if *Dirks* is properly "construed by the courts" so as not to further limit insider-trading liability, "the [SEC]'s insider trading program will not be adversely affected").

Those developments strongly support the *Dirks* standard. As this Court noted in another context under Section 10(b), "Congress' decision to leave § 10(b) intact" when revising the securities laws "suggests that Congress ratified" a "well-established judicial interpretation" of Section 10(b). *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386 (1983); see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982) (same); see also *Kimble*, 135 S. Ct. at 2409-2410 (refusing to overturn precedent when Congress "spurned multiple opportunities to reverse" because "long congressional acquiescence * * * enhance[s] even the usual precedential force" accorded "interpretations of statutes") (quoting *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007)) (internal quotation marks omitted).

C. The Legal Standards That Petitioner Proposes Are Erroneous

Petitioner does not address the *stare decisis* considerations supporting *Dirks* or Congress's approval of its standard. Instead, petitioner suggests (Br. 22) that this Court "reconsider its prior cases" and hold that Section 10(b) "does not prohibit insider trading at

all," at least "where transactions are conducted anonymously in public markets." Alternatively, petitioner suggests (Br. 30) that "personal benefit" in *Dirks* means only "pecuniary gain"—that is, obtaining money or its equivalent in exchange for confidential information. Those contentions lack merit.

1. Petitioner's broadest submission—made for the first time in his merits brief—is that insider trading does not involve any deceit and therefore does not fit within Section 10(b)'s proscription on the use of "any manipulative or deceptive device or contrivance." 15 U.S.C. 78j(b). That argument is incorrect.

As this Court has held for decades, insider trading most certainly does involve deception—it involves the failure to tell a party to whom the tipper or trader owes a fiduciary or similar duty that confidential information, intended to be used only for a limited purpose consistent with the duty, is being taken for personal use in an act closely "akin to embezzlement." *O'Hagan*, 521 U.S. at 654; see, *e.g.*, *id.* at 651-652, 654, 659 (insider trading violates Section 10(b) because it involves "[d]eception through nondisclosure"); *Dirks*, 463 U.S. at 653-664 (same); *Chiarella*, 445 U.S. at 230 (same). That is a straightforward interpretation of Section 10(b)'s broad text, and Congress has ratified it. See pp. 29-32, *supra*.

Petitioner nevertheless submits (Br. 21) that the Court should overrule its long-standing precedents and ignore Congress's views on the ground that Section 16(b) of the Exchange Act, 15 U.S.C. 78p(b), forbids "short-swing profits by certain corporate insiders." But the existence of Section 16(b), which "differs in focus from § 10(b)," *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 n.5

(1991), says nothing about whether Section 10(b) covers bad acts like the ones at issue in this case. Under Section 16(b), a limited category of insiders must disgorge any profits realized from engaging in both a sale and a purchase of corporate stock within a six-month period—without regard to any "proof of actual abuse of insider information" or "proof of intent to profit on the basis of such information." *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973). In creating that "narrowly drawn" remedy, Congress left "some problems of the abuse of inside information" to the "general antifraud statute[] that proscribe[s] fraudulent practices by insiders," thereby "alleviat[ing] concern that ordinary investors are unprotected against actual abuses of inside information in transactions not covered by § 16(b)." *Foremost-McKesson, Inc.* v. *Provident Sec. Co.*, 423 U.S. 232, 251, 255 & n.29 (1976) (citing Section 10(b)); see generally *United States* v. *Naftalin*, 441 U.S. 768, 778 (1979). In sum, petitioner provides no support for dismantling the structure of insider-trading law that this Court synthesized and applied in *Dirks*.

2. a. Although petitioner tries to derive his "pecuniary gain" formulation from *Dirks* itself (Br. 30-31), he does not (and cannot) explain the Court's statement that personal benefit includes things "*such as* a pecuniary gain"—especially when the decision then goes on to list a number of other forms of benefit that qualify. 463 U.S. at 663 (emphasis added). In particular, he virtually ignores the Court's clear statement that a gift of confidential information is sufficient to establish that the tipper has personally benefited and thereby breached his duty. See *id.* at 664; see also *Bateman Eichler*, 472 U.S. at 311 n.21 (discussing

Dirks and stating that personal benefit "can derive from the insider's use of the information to secure a 'pecuniary gain' * * * *or* simply to confer 'a gift of confidential information'") (emphasis added).[3]

Petitioner's proposed rule would give rise to liability only where the tipper seeks to engage in an exchange: information for pecuniary value. But such an exchange is, by definition, a *quid pro quo*, something for something. If the personal-benefit requirement could not be met by a gift giver unless an exchange takes place, then the "gift" discussion in *Dirks* would have been entirely superfluous. See Pet. App. 15-16; *SEC* v. *Payton*, 97 F. Supp. 3d 558, 563 (S.D.N.Y. 2015).[4]

b. Petitioner also relies (Br. 33-34) on criminal-law decisions outside the securities-fraud context that he interprets as requiring a "tangible gain" to consum-

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[3] Petitioner notes (Br. 32) that the facts of this Court's other insider-trading cases involved fraudsters acting for their "own pecuniary benefit." But that says nothing about whether insider-trading liability should be limited to such circumstances.

[4] Petitioner suggests that the personal-benefit requirement should be difficult to satisfy—and thus should exclude gifts without a "tangible economic" payback—because, he claims, *Dirks* limited "tip-based liability" to "'extraordinary'" cases. Br. 45 (quoting *Dirks*, 463 U.S. at 657); see Br. 53. That misinterprets *Dirks*. *Dirks* uses the word "extraordinary" only to reaffirm what *Chiarella* already held: that possession alone of nonpublic information does not trigger a disclose-or-abstain duty and that it is only when an insider breaches an independent "legal obligation[]" that trading is barred. *Dirks*, 463 U.S. at 657. When discussing the personal-benefit requirement itself, *Dirks* makes clear that the requirement may be satisfied through well-recognized (but regrettably ordinary) breaches of duty—including making a "gift" of information for trading—that do not involve pecuniary gain to the giver. *Id.* at 663-664.

mate a violation—and suggests that personal benefit in an insider-trading case must similarly be understood as requiring "tangible gain." His reliance on non-securities-fraud decisions is misplaced.

The decisions at issue interpret statutory elements requiring that a defendant's conduct deprive a person of money or property, *Cleveland* v. *United States*, 531 U.S. 12, 22-23 (2000) (wire fraud); *McNally* v. *United States*, 483 U.S. 350, 357-359 (1987) (mail fraud); result in obtaining property, *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724-2727 (2013) (extortion under the Hobbs Act); or involve a bribe or kickback, *Skilling* v. *United States*, 561 U.S. 358, 403-404 (2010) (honest-services mail and wire fraud). An analogous property-based element is readily satisfied in an insider-trading case: the violation involves a deprivation of the shareholders' or the corporation's property rights (or both). Fraudulent trading with shareholders injures their financial interests. See *Dirks*, 463 U.S. at 653-654. And fraudulent use of a corporation's information injures its property interests. See *Carpenter*, 484 U.S. at 25-26 (recognizing "property right in keeping confidential and making exclusive use" of "[c]onfidential business information"); see also *O'Hagan*, 521 U.S. at 653-654 (same, under misappropriation doctrine). Accordingly, when a tipper takes confidential information and gives it to a tippee for trading, the tipper has necessarily taken valuable property away from the party with the right to control how the information is used and to whom it is disclosed—and the trading with shareholders (in a classical insider-trading case) constitutes a further property-based fraud.

The question answered by the personal-benefit requirement is an entirely different one: whether such a deprivation of property involves deception. See *Dirks*, 463 U.S. at 653-655. Under *Dirks*, no deception occurs unless a fiduciary duty is breached, and no fiduciary duty is breached unless the tipper acts for his own personal purpose rather than for a corporate purpose. See *id.* at 659-667; pp. 18-28, *supra*. This Court's mail- and wire-fraud precedent is consistent with that analysis, see *Carpenter*, 484 U.S. at 27-28, and that precedent does not embrace petitioner's view that no deceptive breach occurs if the tipper uses corporate property for a non-corporate purpose but does not himself realize a resulting "tangible gain" (Br. 33). Accordingly, those cases provide no support for petitioner's restrictive personal-benefit approach.

c. Ultimately, petitioner fails to explain how his proposed rule relates to the statutory requirement addressed in *Dirks*: whether a defendant has used "any manipulative or deceptive device or contrivance" in violation of the securities laws. 15 U.S.C. 78j(b). He provides no historical or legal support for his submission that a faithless agent, who misuses corporate information entrusted to him by giving it to another for trading, has not personally benefited absent pecuniary gain. Nor can he plausibly attribute such a rule to Congress.[5] And displacing the *Dirks* framework with a newly fashioned "pecuniary gain" rule would raise a host of legal questions that petitioner does not

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[5] When Congress wanted to ensure that a proscription in the Exchange Act was limited to situations in which "profit [is] realized" by an insider, it knew how to do so. 15 U.S.C. 78p(b) (disgorgement of "profit realized by" insider who engages in short-swing trading).

even attempt to address.[6] In short, petitioner fails to offer any justification for replacing *Dirks*'s long-standing personal-benefit rule with a new set of requirements.

D. Petitioner's Attack On The *Dirks* Standard Lacks Merit

Petitioner suggests (Br. 35-57) that his "pecuniary gain" test is necessary to avoid vagueness, provide guidance to the securities markets, and prevent asserted abuses. His arguments, which are premised on a distortion of the personal-benefit test, lack merit.

1. The Dirks *standard is not vague*

The Due Process Clause bars enforcement of a criminal statute as vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015); *Skilling*, 561 U.S. at 402-403. Contrary to petitioner's contention (Br. 40-55), *Dirks*'s long-standing interpretation of Section 10(b) and Rule 10b-5 is not vague under either aspect of that test. It provides fair notice of what conduct constitutes illegal

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[6] It is unclear, under petitioner's proposal, whether the pecuniary gain must be immediate; whether the tipper's receipt of any amount of money, no matter how small, suffices; whether the tipper must actually receive money, or just have expected to receive money at the time he gave the tip; or whether a tip that might or might not result in pecuniary gain for the tipper could result in securities fraud. See 4 *Bromberg and Lowenfels on Securities Fraud* § 6:516, at 6-1340 to 6-1340.1 (2d ed. 2016) (discussing "difficulties in deciding whether something is a pecuniary benefit").

insider trading, and it forecloses "subjective" or discriminatory prosecutorial judgments. *Williams*, 553 U.S. at 306.

a. For the more than 30 years that *Dirks* has been the law, it has been easily understood that an insider personally benefits when he acts for a personal purpose by giving a gift of confidential information for trading. *Dirks* itself says as much, in plain and unmistakable terms. See 463 U.S. at 663-664, 667; *id.* at 664 (noting importance of creating "guiding principle"); see also *Bateman Eichler*, 472 U.S. at 311 n.21.

That holding was embraced by courts, which—but for the Second Circuit's erroneous decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied, 136 S. Ct. 242 (2015), see Pet. App. 15-16—applied it with apparent ease. See, *e.g.*, *id.* at 12 ("Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned."); *SEC* v. *Ginsburg*, 362 F.3d 1292, 1295, 1304 (11th Cir. 2004) ("Deliberately tipping material nonpublic information for family members' financial gain is a bad thing, and doing it twice in a year is doubly so."); *SEC* v. *Rocklage*, 470 F.3d 1, 4, 7 n.4 (1st Cir. 2006); *SEC* v. *Warde*, 151 F.3d 42, 48-49 (2d Cir. 1998); *Maio*, 51 F.3d at 627, 632-633. Commentators, financial-industry actors, and the public at large have also understood that under *Dirks* giving inside information for use in securities trading as a personal gift, and receiving inside information with knowledge that it has been bestowed as a personal gift, violates the securities laws. See, *e.g.*, Ass'n for Investment Mgmt. & Research Amicus Br. at 3-4, 14-15, *O'Hagan*, *supra* (No. 96-842) (financial-industry

association characterizing the *Dirks* gift language as part of a "bright-line test" that creates "great[] certainty"). Indeed, the insider in this very case harbored no doubt that his gift-giving behavior was legally impermissible. See, *e.g.*, pp. 2-5, *supra* (Maher on notice that his behavior was illegal, regretted a tip for fear of violating the law, and took steps to hide tipping from authorities); J.A. 125 (Maher testifies he told Michael that tip "was illegal" and the SEC might "trace this phone call").

The ease with which *Dirks*'s holding has been understood is not surprising. The line between transmission of confidential information for personal use and transmission of that information for a "legitimate business justification," 463 U.S. at 663, was adopted precisely to separate permissible from impermissible conduct. No question about its application arose here. See, *e.g.*, Pet. App. 16 (concluding, based on ample evidence, that Maher tipped "for the purpose of benefiting and providing for his brother Michael").[7] That line is particularly clear given that no securities-fraud liability attaches unless the tipper has "breach[ed] a recognized [fiduciary] duty" of which he should already be aware. *O'Hagan*, 521 U.S. at 666. More specifically, it is not difficult to ascertain when an insider has tipped confidential information as a gift so that his

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[7] Nor does the possibility of closer cases produce a vagueness problem. *Dirks* recognized that its personal-benefit standard is a "question of fact," which "will not always be easy for courts." 463 U.S. at 664. But the possibility of close factual cases does not render a statute vague. "Close cases can be imagined under virtually any statute" that requires a factual determination; it is only when the standard itself is indeterminate that a vagueness problem exists. *Williams*, 553 U.S. at 306. No such indeterminacy exists here.

brother, his girlfriend, his roommate, his employee, or some other person can trade on it and make a secret profit. As petitioner acknowledges (Br. 40), "gift" has a widely accepted meaning, and the concept of a gift arises often in daily life as well as in numerous areas of the law.

b. Petitioner's contrary arguments (Br. 41-43) are based on a misconception of the applicable standard.

First, petitioner contends (Br. 41-42) that if "emotional satisfaction" sufficed to show a personal benefit, then it would be difficult to discern "[w]hich emotions give rise to insider trading liability, and which do not." But *Dirks* does not require any inquiry into the existence of personal satisfaction in a particular case. What matters is "objective" evidence relevant to the "purpose of the disclosure," *Dirks*, 463 U.S. at 662-663, not a subjective determination of whether the insider experienced an adequate range or intensity of emotion in carrying out that purpose. An insider's gift of information for trading, for no corporate purpose, violates an insider's *Cady, Roberts* duty—regardless of the gift giver's subjective feelings about his breach.[8]

Second, petitioner suggests (Br. 43) that *Dirks* is unworkable, particularly for a remote tippee, because too many questions arise about who qualifies as a friend or relative. But *Dirks* refers to "a trading rela-

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[8] Contrary to petitioner's suggestion (Br. 42), the facts of *Dirks* demonstrate that subjective satisfaction is not the test for personal benefit. Secrist, the former executive, might well have felt personally gratified to expose the fraud by revealing it to Dirks. What made the disclosure not for a personal benefit was the fact that exposure of the fraud was consistent with Secrist's obligations to shareholders. 463 U.S. at 666-667.

tive or friend" only as an exemplar of a typical situation in which an insider would be likely to act for a personal rather than a corporate purpose. See 463 U.S. at 663-664, 667. The tipper's purpose, rather than the identity of the recipient, is dispositive. See pp. 18-28, *supra*. Accordingly, courts applying *Dirks* need not attempt to answer any of the questions posed by petitioner about the degree of closeness involved in various relationships.

Finally, petitioner purports to identify evidence (Br. 45-48) that the government actually has engaged in "arbitrary enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), under the *Dirks* standard. No such evidence exists. Petitioner simply identifies cases that are roughly analogous to his own and claims that they should not have been prosecuted because of his disagreement with *Dirks*.

For instance, in service of his idea that the government "has pursued an extremely aggressive litigation strategy" (Br. 47), petitioner lists cases in which the personal benefit to the tipper was the giving of a gift to someone in his personal sphere without any corporate purpose. Those cases—including an insider's provision of highly sensitive mergers-and-acquisition information to his mistress for wholly personal reasons, enabling her to make large amounts of money, see *Gansman*, 657 F.3d at 90-92, and an insider's tip to a friend for purposes of enabling his trading, garnering that friend nearly $1 million in quick, risk-free profits, see *Warde*, 151 F.3d at 46-49 —are in the heartland of the securities-law violation that *Dirks* describes. See Pet. App. 12.[9] In pursuing

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[9] The allegedly "draconian" sentences for such conduct that petitioner singles out for complaint (Br. 51) reflect proper considera-

such cases under the *Dirks* standard, the government has exercised a power "no broader than the authority [it] routinely exercise[s] in enforcing the criminal laws" or the securities laws. *United States* v. *Batchelder*, 442 U.S. 114, 126 (1979).

Separately, petitioner claims (Br. 48, 59) that the government has "cast" too "wide [a] net" in pursuing someone in a tipping chain other than the original tipper or tippee. The question of whether a tippee can ever be too "remote" from the tipper's own bad act has nothing to do with the meaning of "personal benefit" and is therefore outside the scope of the question presented in this case. See *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992); Sup. Ct. R. 14.1(a). In any event, *Dirks* makes clear that a tippee has derivative liability for an insider's breach of duty, on a "constructive trust" theory, if the tippee knows that the insider personally benefited; *Dirks* does not hold that a tippee's liability depends on having had a direct relationship or interchange with the insider. 463 U.S. at 660 n.20; see *id.* at 659-661; see also *Bateman Eichler*, 472 U.S. at 302, 311 n.21 (discussing liability of tippees once removed from original tipper). Pursuit of tippees like petitioner—who obtained the confidential information from the first-line tippee rather than from the insider himself—is justified so long as evidence shows that the tippee had the requisite knowledge of the

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tion of the relevant factors under the Sentencing Guidelines, including obstructive actions by the defendant. See, *e.g.*, *United States* v. *Skowron*, 11-cr-699 Docket entry No. 27 (S.D.N.Y. 2011) (below-Guidelines sentence despite obstruction of justice); *United States* v. *Contorinis*, 09-cr-1083 Docket entry No. 94 (S.D.N.Y. 2010) (below-Guidelines sentence despite perjury); *United States* v. *Riley*, 13-cr-339 Docket entry No. 258 (S.D.N.Y. 2015) (below-Guidelines sentence for tipper in $39 million scheme).

insider's breach and the other elements of Section 10(b) liability are satisfied. Nothing about such cases indicates that existing law leaves prosecutors free to "pursue their personal predilections." *Kolender*, 461 U.S. at 358 (citation omitted).

c. The absence of any vagueness concern about the rule that a personal gift amounts to a personal benefit is confirmed by the "sturdy safeguards Congress has provided" to establish scienter. *O'Hagan*, 521 U.S. at 665 (rejecting vagueness argument in insider-trading case).

To establish either a civil or criminal violation of Section 10(b), the government must establish culpable intent: an "intent to deceive, manipulate, or defraud." *Dirks*, 463 U.S. at 663 n.23 (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). In a criminal case, the government must show that the defendant committed the violation "willfully," 15 U.S.C. 78ff(a), because he realized that he was committing a wrongful act, *O'Hagan*, 521 U.S. at 665-666; see, *e.g.*, *United States* v. *Kaiser*, 609 F.3d 556, 568-570 (2d Cir. 2010); see also J.A. 394. For a tippee like petitioner, knowledge that his conduct was wrongful depends on knowledge that the insider breached a fiduciary duty by disclosing material, nonpublic information for a personal benefit—a significant limitation on tippee liability. See *Dirks*, 463 U.S. at 660, 662; J.A. 396-397.

As the Court observed in *O'Hagan*, the "'requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]' in circumstances such as [petitioner's] is unjust." *O'Hagan*, 521 U.S. at 666 (quoting *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342

(1952)). Where a defendant consciously acts in a manner that he knows to be wrongful, and where his conduct is fairly encompassed by the terms of the criminal statute, he faces no "trap for the unwary." *United States* v. *Yermian*, 468 U.S. 63, 74 (1984).

To overcome that flaw in his vagueness argument, petitioner asserts (Br. 49) that "the Ninth Circuit has gutted [the scienter] safeguard against government overreaching" through holdings on willfulness and deliberate ignorance. That is not the issue here, but in any event, the Ninth Circuit recognizes that the willfulness requirement for criminal liability in this context means "intentionally undertaking an act that one knows to be wrongful," *United States* v. *Tarallo*, 380 F.3d 1174, 1188 (2004), see J.A. 394 (jury instructions)—a robust safeguard against convicting someone of a crime as to which they lack fair notice. And while the evidence in this case established petitioner's actual knowledge of the facts giving rise to the jury's finding that he willfully "act[ed] for the wrongful purpose of defrauding or deceiving someone," J.A. 394, the Ninth Circuit has also correctly held, consistent with *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754 (2011), that a defendant's knowledge of a fact can be established by evidence that the defendant deliberately avoided learning the fact while aware of a high probability of its existence. See Pet. App. 23-25; Br. in Opp. 13-18, 21-22; compare Pet. i, with 136 S. Ct. at 899 (declining to grant review of deliberate-ignorance question).

2. The Dirks *standard is not unduly broad*

Invoking the separation of powers and the rule of lenity, petitioner also argues (Br. 36-40) that the *Dirks* Court did not interpret Section 10(b) narrowly

enough in ruling that a personal benefit exists when a tipper gives a gift of confidential information. But *Dirks* cabined the scope of insider-trading liability, and neither of those doctrines justifies any further narrowing.

Petitioner asserts that "the insider trading offense, like the private § 10(b) action, was created by the judiciary," which cannot "define new federal crimes." Br. 36, 39 (citation omitted). But petitioner's premise is mistaken. While the private remedy for violation of Section 10(b) is not found in the text of the provision, and therefore can be described as a "judicial construct," *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008), the proscription on insider trading—of which the personal-benefit requirement is a part—is different. That proscription is drawn directly from the text of Section 10(b), which forbids any manipulation or deception in connection with the purchase or sale of securities, in contravention of the SEC's rules. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172-173 (1994) (contrasting decisions about private right of action, which "Congress did not create," with decisions about "the scope of conduct prohibited by § 10(b)," including *Dirks* and *Chiarella*, as to which "the text of the statute controls").

Section 10(b) is unquestionably broad—and intentionally so, to capture all kinds of fraud. See *Ernst & Ernst*, 425 U.S. at 203 (Section 10(b) is "catchall" to "deal with new manipulative or cunning devices"). That does not make it ambiguous. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985) (statute's application to "situations not expressly antici-

pated by Congress does not demonstrate ambiguity"; "[i]t demonstrates breadth") (citation omitted). No separation-of-powers or rule-of-lenity issue arises when a court interprets or applies such a statute as written. See, *e.g.*, *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (rule of lenity applies only to resolve "a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended") (citation omitted).

Dirks interpreted Section 10(b) to conform with background concepts of fraud and provide clarity to the securities markets. In *Dirks* (and in *Chiarella*), the Court rejected a parity-of-information rule under which any use in securities trading of confidential information to which the counterparty did not have access would be considered a deceptive device. See 463 U.S. at 657 ("*Chiarella* * * * repudiat[ed] any notion that all traders must enjoy equal information before trading"). Rather, the Court explained, the requisite deception does not exist in impersonal marketplace transactions unless the insider violates a recognized duty. See *Dirks*, 463 U.S. at 657, 660-662; see also *O'Hagan*, 521 U.S. at 652-653. That rule restricts insider-trading liability to fraudulent conduct, eliminating liability, for example, where the insider disclosed the information for corporate purposes, incorrectly believed that the information was public or immaterial, or disclosed the information inadvertently. See 463 U.S. at 662 & n.22, 666-667. And because *Dirks* absolves a tippee of securities-fraud liability unless the tippee knows about the insider's breach of duty, *id.* at 659-660 & n.20, tippees are similarly not exposed to liability simply for trading on nonpublic information.

Petitioner suggests (Br. 50, 52-54) that *Dirks* has somehow evolved into a parity-of-information rule and that the genie can be returned to the bottle only by imposing a novel pecuniary-gain limitation on *Dirks*. Experience provides no basis for that assertion. The Court anticipated the need for "a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules," 463 U.S. at 664, and articulated one based in common-law rules and the text and policies of the securities law. And it specifically recognized that a "gift" of information for trading violates a "fiduciary duty" and involves the "exploitation of nonpublic information." *Ibid.* In light of the Court's rejection of the parity-of-information approach in *Dirks*, petitioner's assertion (Br. 50, 52-54) that applying *Dirks*'s personal-benefit standard to improper gifts would resurrect that approach is unfounded.

E. The Proposal To Narrow *Dirks* To Exclude Gifts Would Harm Investors And The Securities Markets

Petitioner's proposed restriction of *Dirks* would seriously undermine "an animating purpose" of the securities laws: "to insure honest securities markets and thereby promote investor confidence." *O'Hagan*, 521 U.S. at 658; see 15 U.S.C. 78b (regulation of deceptive practices is necessary "to insure the maintenance of fair and honest markets"). Under petitioner's pecuniary-gain-only rule, an insider who provided highly confidential, market-moving corporate information so that his children, his parents, his friends, or his other connections could trade on it would evade the securities-fraud laws so long as he did not receive any pecuniary return from the tippees for doing so—and the tippees could enjoy virtually unlimited profits,

unavailable to less privileged investors, without incurring any such liability. See Pet. App. 16. When Congress enacted the Exchange Act to "eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office," *Dirks*, 463 U.S. at 653 n.10 (citation omitted), it cannot have intended that harmful interpretation of Section 10(b).[10]

1. "[E]liminat[ing] 'use of inside information for personal advantage,'" *Dirks*, 463 U.S. at 662 (citation omitted), is vital to investor confidence in our securities markets, "the comparative honesty of which is one of our nation's great business assets." *Payton*, 97 F. Supp. 3d at 559; see *O'Hagan*, 521 U.S. at 657-658. An insider who makes personal use of inside information, without a corporate justification, "tak[es] unfair advantage of uninformed stockholders," *O'Hagan*, 521 U.S. at 652 (quoting *Chiarella*, 445 U.S. at 228-229), and harms "the buying public," which is "wholly unprotected from the misuse of special information," *Cady, Roberts*, 40 S.E.C. at 913. Such activity also strips investors of confidence that the markets are fair and open. See *O'Hagan*, 521 U.S. at 658-659. While some "informational disparity is inevitable in the

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[10] Notably, the Second Circuit's decision in *Newman*, on which petitioner's proposed rule appears to be patterned, see 773 F.3d at 452, has been subject to withering criticism along those lines. See, *e.g.*, Carlyle H. Dauenhauer, *Justice in Equity:* Newman *and Egalitarian Reconciliation for Insider-Trading Theory*, 12 Rutgers Bus. L. Rev. 39, 91-92 (2015) (*Newman* creates "precarious and disturbing legal uncertainty"); Michael Perino, *The Gift of Inside Information*, N.Y. Times, Dec. 12, 2014, http://dealbook.nytimes.com/2014/12/12/the-gift-of-inside-information/ ("Allowing executives to give away information to whomever they choose so long as they get nothing in return simply makes no sense.").

securities markets," a rational investor will "hesitate to venture * * * capital" in a rigged game—one in which he faces a systematic "informational disadvantage" vis-à-vis insiders and their chosen beneficiaries that can never "be overcome with research or skill." *Ibid.*; see *Dirks*, 463 U.S. at 661-662; see also 1983 House Report 2.

Small investors are especially likely to be deterred from participating in the securities markets under such circumstances. See 1988 House Report 8. And those investors who do decide to participate, despite insurmountable informational disadvantages, are likely to demand risk premiums for doing so. See Brudney 334-335, 356; see also Michael Manove, *The Harm from Insider Trading and Informed Speculation*, 104 Q. J. Econ. 823, 824 (1989). If investors leave the securities markets or demand premiums for staying, then capital formation will be impaired—a point that has been expressly noted by congressional committees endorsing increased sanctions for insider trading. See 1988 House Report 8; 1983 House Report 2.

Providing certain favored investors with a special advantage also has other negative effects. It discourages securities analysts from providing legitimate investors with valuable insights. Effective professional analysis of the value of a company's stock is a labor-intensive process, see, *e.g.*, *DeMarco* v. *Lehman Bros. Inc.*, 222 F.R.D. 243, 246 (S.D.N.Y. 2004)—and if non-analyst market participants can sidestep that labor by siphoning secret information from insiders, thereby arriving at "predictions" of corporate performance that no model can equal, then legitimate analysts will be discouraged from doing the work that is necessary

for the markets to function effectively. See Michael J. Fishman & Kathleen M. Hagerty, *Insider Trading and the Efficiency of Stock Prices*, 23 RAND J. Econ. 106, 107 (1992). In addition, advance trading on confidential information about corporate acquisitions—as occurred in this case—can drive up the cost of transactions by increasing the price that the acquiring company must pay for tendered shares. See J.A. 39-46, 52-53, 70-76, 171-173; see also, *e.g.*, *Maio*, 51 F.3d at 634 n.12; Bradford Cornell & Erik R. Sirri, *The Reaction of Investors and Stock Prices to Insider Trading*, 47 J. Fin. 1031, 1032-1033, 1045-1046 (1992).[11]

2. Petitioner's proposed pecuniary-benefit-only rule would give rise to just such harms.

The incentives for insiders to bestow gifts of inside information on others are obvious—especially given how often insiders already take that step under a regime in which they know that their actions are illegal. See, *e.g.*, Langevoort §§ 1:8, 11:9 ("nearly half" of SEC insider-trading cases "involved some sort of 'tip,'" and "largest category of unlawful tipping involves instances where an insider passes along information to a friend or a relative").[12] If insiders could

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[11] Petitioner contends that insider-trading regulation "harm[s] the securities markets." Br. 27 n.7; see Cato Inst. Amicus Br. 16-20. That contention has been rejected by a near-consensus of academics, see, *e.g.*, Alexandre Padilla & Brian Gardiner, *Insider Trading: Is There an Economist in the Room?*, 24 J. Private Enterprise 113, 123 (2009) ("economists have progressively reached the same conclusion: that insider trading * * * ought to be prohibited"), and Congress has not accepted it, see, *e.g.*, 1988 House Report 8.

[12] See also Patrik Augustin et al., *Informed Options Trading Prior to M&A Announcements: Insider Trading?* 2 (May 2014),

give tippees valuable information with no fear of securities-fraud liability, then more individuals are likely to risk doing so—especially if they could secure in return a non-pecuniary benefit, such as romantic favors from a mistress or a college-admissions preference for their children. See, *e.g.*, *Warde*, 151 F.3d at 46 (tipper's friend obtained nearly $1 million); Pet. App. 5 (petitioner shared tippee profit of over $1.5 million with his brother-in-law). And because the liability of everyone down a tipping chain stems from the insider's breach of duty, in the absence of such a breach the first-line tippees would themselves be able to pass the information to others, or even sell it, without running afoul of Section 10(b) or Rule 10b-5. See, *e.g.*, pp. 5-6, *supra* (Michael passed information to others and received a monetary kickback).

That state of affairs would shake investor confidence and upend the normal operation of the financial industry and the securities markets. It would create two classes of investors: those with "cozy" connections to insiders at corporations or the law firms, accountants, and bankers who service those corporations, see John C. Coffee, Jr., *Getting Away with Insider Trading*, N.Y. Times, May 23, 2016, at A19, and those left on the outside. The profits enjoyed by the former group would be made at the expense of the latter group, see *O'Hagan*, 521 U.S. at 665-666, which would no doubt include many small and relatively unsophisticated investors. In that world, the markets would not in any way resemble the "fair and honest"

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http://irrcinstitute.org/wp-content/uploads/2015/09/Informed-Options-Trading_June-12-20141.pdf (study suggesting that insider trading takes place in approximately 25% of mergers and acquisitions); 1983 House Report 2.

ones that Congress intended to ensure by enacting the Exchange Act. 15 U.S.C. 78b; see H.R. Conf. Rep. No. 229, 94th Cong., 1st Sess. 91-92 (1975).

3. Petitioner's suggestion that his proposed standard would not result in such harms (see Br. 27, 54 n.12) lacks merit.

First, petitioner asserts (Br. 27) that enforcement of *Dirks*'s personal-benefit rule "over-deter[s] the legitimate exchange of information" and his approach would be a correction. But *Dirks* already strikes a careful balance that avoids just such overdeterrence. The Court recognized the important role that market analysts play in obtaining and analyzing information, and the Court was cautious not to advance a rule that would unduly "inhibit[] * * * the role of market analysts." 463 U.S. at 658; see *id.* at 658-659 & nn.17-18. And circumstances have changed since *Dirks* was decided in a way that makes overdeterrence even less likely. Although analysts used to routinely obtain material, nonpublic information "by meeting with and questioning corporate officers" who were acting in the normal course of their corporate duties, *id.* at 658-659, the SEC's Regulation FD now forbids corporations from disclosing such information selectively to analysts rather than to the public at large. See 17 C.F.R. 243.100-243.103; 65 Fed. Reg. 51,716 (Aug. 24, 2000); Andreas Gintschel & Stanimir Markov, *The Effectiveness of Regulation FD*, 37 J. Acct. & Econ. 293, 294-295, 312-313 (2004).[13] Because Regulation FD alters the interactions between issuers and analysts with which *Dirks* was concerned, solicitude for analysts

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[13] In addition, whistleblowers like Secrist and Dirks are now protected under 15 U.S.C. 78u-6 (Supp. IV 2010), 17 C.F.R. 240.21F-1 *et seq.*, and 18 U.S.C. 1514A.

provides no reason to restrict the *Dirks* personal-benefit standard.

Second, petitioner claims (Br. 54 n.12) that "mechanisms" other than the federal securities-fraud provisions "may be available" to "deter the illicit disclosure of inside information." But private policies or state law could not fill that gap. Such measures could not be uniform, even though national uniformity is vital in this area. See generally *Lampf*, 501 U.S. at 357-361. And without the enforcement power of the SEC and the federal criminal authorities, the lucrative tipping that petitioner's rule would encourage would be less likely to be detected, let alone prevented. Cf. Roman P. Wuller, Note, *Insider Trading: Circumventing the Restrictive Contours of the* Chiarella *and* Dirks *Decisions*, 1985 U. Ill. L. Rev. 503, 505-507. The federal "mechanisms" to which petitioner points would be of little aid in that regard because of their limited applicability or their dependence on insider-trading law. Regulation FD applies only when the disclosing person is acting on behalf of an issuer of securities. 17 C.F.R. 243.100. That excludes unauthorized "gifts." See 17 C.F.R. 243.101(c) ("disclos[ing] material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer"). And the Exchange Act provision requiring broker-dealers to maintain policies "to prevent the misuse" of confidential information applies only to disclosures that would otherwise be "in violation of" the securities laws. 15 U.S.C. 78*o*(g).

F. Petitioner's Convictions Should Be Affirmed

Under a straightforward application of *Dirks*, petitioner's convictions must stand. As the court of ap-

peals observed, the evidence of personal benefit to the tipper, petitioner's knowledge of that benefit, and the other elements of Section 10(b) liability was overwhelming. See Pet. App. 12, 16-17. That evidence established that Maher willingly gave Michael gifts of inside information for a personal purpose knowing that his brother would trade on it, thus conferring a trading advantage "the average person does not have access to" and "would never have or dream of" having. J.A. 251. It also established that petitioner knew of Maher's personal benefit when trading on the information himself: he was told of the sensitivity of the source and the need to protect Maher and went to great lengths to conceal his own trading. See pp. 5-7, *supra*.[14]

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[14] Petitioner's suggestion of an absence of "fraudulent conduct" in his case (*e.g.*, Br. 34-35) distorts the trial record and relies on evidence that the jury must have rejected through its verdict. For instance, petitioner emphasizes trial testimony by Maher that Michael swore "he would not trade." *E.g.*, Br. 35 (citing J.A. 81). But petitioner neglects to mention that Michael's statement came early in the "evolution of the way that [Maher] was transferring information to [his] brother," J.A. 79, and that the conduct involved in this case happened later, see J.A. 81; see also J.A. 83 ("[A]t the point where I decided to give him information with the intent to help him trade I didn't want to ask him again, 'Are you trading,' because I knew what the answer was going to be, and that was going to be 'Yes.'"). Petitioner also contends (Br. 35) that Maher acted only because "Michael pressured him into providing the information." Even if that were true, it would not absolve Maher of wrongdoing or demonstrate a lack of personal benefit—but, in any event, petitioner omits mention of Maher's statements that he "knowingly, willfully acted to benefit [his] brother." J.A. 119.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
ROSS B. GOLDMAN
Attorney

ANNE K. SMALL
General Counsel
SANKET J. BULSARA
Deputy General Counsel
MICHAEL A. CONLEY
Solicitor
JACOB H. STILLMAN
Senior Advisor to the Solicitor
DAVID D. LISITZA
Senior Litigation Counsel
Securities and Exchange Commission

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APPENDIX

1. 15 U.S.C. 78j (2006)[1] provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or con-

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[1] In 2010, this provision was amended to (1) strike out "registered on a national securities exchange" and insert "other than a government security" in Subsection (a)(1); (2) strike out "(as defined in section 206B of the Gramm-Leach-Bliley Act)" where it appeared; and (3) add a new Subsection (c), which covers "effect[ing], accept[ing], or facilitat[ing] a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 762(d)(3), 929L(2), 984(a), 124 Stat. 1761, 1861, 1932.

trivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

2. 15 U.S.C. 78ff provides:

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or

document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $2,000,000.

(B) Any issue that violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

3. 18 U.S.C. 2 provides:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, in-

duces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

5. 17 C.F.R. 240.10b-5 provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

6. 17 C.F.R. 240.10b5-1 provides:

Trading "on the basis of" material nonpublic information in insider trading cases.

PRELIMINARY NOTE TO § 240.10b5-1: This provision defines when a purchase or sale constitutes trading "on the basis of" material nonpublic information in insider trading cases brought under Section 10(b) of the Act and Rule 10b-5 thereunder. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-1 does not modify the scope of insider trading law in any other respect.

(a) *General.* The "manipulative and deceptive devices" prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or deriva-

tively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

(b) *Definition of "on the basis of."* Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is "on the basis of" material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.

(c) *Affirmative defenses.* (1)(i) Subject to paragraph (c)(1)(ii) of this section, a person's purchase or sale is not "on the basis of" material nonpublic information if the person making the purchase or sale demonstrates that:

(A) Before becoming aware of the information, the person had:

(*1*) Entered into a binding contract to purchase or sell the security,

(*2*) Instructed another person to purchase or sell the security for the instructing person's account, or

(*3*) Adopted a written plan for trading securities;

(B) The contract, instruction, or plan described in paragraph (c)(1)(i)(A) of this Section:

(*1*) Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;

(*2*) Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which

and the date on which the securities were to be purchased or sold; or

(*3*) Did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so; and

(C) The purchase or sale that occurred was pursuant to the contract, instruction, or plan. A purchase or sale is not "pursuant to a contract, instruction, or plan" if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to those securities.

(ii) Paragraph (c)(1)(i) of this section is applicable only when the contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of this section.

(iii) This paragraph (c)(1)(iii) defines certain terms as used in paragraph (c) of this Section.

(A) *Amount.* "Amount" means either a specified number of shares or other securities or a specified dollar value of securities.

(B) *Price.* "Price" means the market price on a particular date or a limit price, or a particular dollar price.

(C) *Date.* "Date" means, in the case of a market order, the specific day of the year on which the order is to be executed (or as soon thereafter as is practicable under ordinary principles of best execution). "Date" means, in the case of a limit order, a day of the year on which the limit order is in force.

(2) A person other than a natural person also may demonstrate that a purchase or sale of securities is not "on the basis of" material nonpublic information if the person demonstrates that:

(i) The individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of the information; and

(ii) The person had implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale of any security as to which the person has material nonpublic information, or those that prevent such individuals from becoming aware of such information.

7. 17 C.F.R. 240.10b5-2 provides:

PRELIMINARY NOTE TO § 240.10b5-2: This section provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the "misappropriation" theory of insider trading under Section 10(b) of the Act and Rule 10b-5. The law of insider trading is otherwise defined by

judicial opinions construing Rule 10b-5, and Rule 10b5-2 does not modify the scope of insider trading law in any other respect.

(a) *Scope of Rule.* This section shall apply to any violation of Section 10(b) of the Act (15 U.S.C. 78j(b)) and § 240.10b-5 thereunder that is based on the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence.

(b) *Enumerated "duties of trust or confidence."* For purposes of this section, a "duty of trust or confidence" exists in the following circumstances, among others:

(1) Whenever a person agrees to maintain information in confidence;

(2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or

(3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; *provided,* however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information

confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.

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In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

JOHN D. CLINE
LAW OFFICE OF JOHN D. CLINE
235 Montgomery Street
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

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INTRODUCTION

The government's brief illustrates the dangers of common-law crimes. A personal benefit test that extends beyond pecuniary gain presents vagueness dangers, so the government asks the Court to refashion the judge-created tipping crime by replacing the personal benefit element with a broader "lack of corporate purpose" requirement. The government invites the Court to create this new rule long after Petitioner acted, thus ensuring that he had no notice of the proposed retroactive judicial expansion of the crime.

This Court barred common-law crime creation 200 years ago to avoid precisely this sort of after-the-fact judicial enlargement of crimes and to preserve the proper roles of the legislative and judicial branches. If the Court elects to preserve the crime of insider trading without legislation expressly authorizing and defining the offense—and the government's brief underscores the reasons to discard the judge-created offense—it should narrowly construe *Dirks*. Properly read, *Dirks* requires that the insider sought a pecuniary benefit. Because Maher Kara never sought any such benefit, as the district court and the SEC both found, Petitioner's conviction cannot stand.

I. THE GOVERNMENT'S RADICALLY EXPANDED DEFINITION IS BARRED BY THE COURT'S PRECEDENTS

The government proposes to rewrite, and vastly expand, the insider trading crime and replace *Dirks* with an entirely new theory of tippee liability. It wants to criminalize far more conduct than even the Ninth Circuit's test purports to capture. For the first time in its merits brief, the government maintains that the Court's "personal benefit" requirement can be satisfied *without proof of any benefit whatsoever*—pecuniary, tangible, or even psychic or emotional. The government would replace *Dirks*' "personal benefit" test with a "lack of corporate purpose" test: knowingly trading on material nonpublic information would be criminal whenever an insider disclosed the information "for personal, rather than corporate, reasons." U.S.Br.18.

This is not the law. The government's argument is foreclosed by this Court's precedents and has no basis in the language or legislative history of §10(b). The government has abandoned the Ninth Circuit's test because it is unconstitutionally vague. It now seeks instead to vastly expand tippee liability and institute the *de facto* parity-of-information rule this Court has repeatedly rejected.

A. The Government's Position Is Squarely At Odds With *Dirks*

1. The *Dirks* Court did not hold that tipping liability under §10(b) depends on whether the insider had a corporate purpose for making his disclosure. The Court unequivocally described its test in terms of personal gain and benefit: "[T]he test is whether the insider personally *will benefit*, directly or indirectly, from his disclosure. Absent some *personal gain*, there has been no breach of duty to stockholders." 463 U.S. at 662 (emphasis added).

The Court also held that mere lack of a corporate purpose is insufficient to trigger tipping-and-trading liability under §10(b). The only "purpose" that can transform a disclosure of confidential information into criminal securities fraud is the insider's pursuit of "personal gain." *Id.* at 659. Insiders may not "personally us[e] undisclosed corporate information to their *advantage*," and "may not give such information to an outsider for the *same improper purpose* of exploiting the information for their *personal gain*." *Id.* (emphasis added). *Cf. id.* at 668, 671, 673 & n.9 (Blackmun, J., dissenting) (criticizing Court for making "the improper purpose of personal gain" determinative of §10(b) liability).

The Court adopted a *quid pro quo* "theory... that the insider, by giving the information out selectively, is in effect selling the information...for cash, reciprocal information, or other things of value for himself." *Id.* at 663-64 (quotation marks omitted). The Court further held that this personal

gain test depends on "whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663.

The Court emphasized personal gain because, contrary to the government's argument (U.S.Br.18-19), breaching one's fiduciary duty by disclosing confidential corporate information for trading does not—without more—violate §10(b). *Dirks* quoted and reaffirmed *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472-73 (1977), which held that a mere breach of fiduciary duty is insufficient: "Not 'all breaches of fiduciary duty in connection with a securities transaction,'...come within the ambit of Rule 10b–5. There must also be 'manipulation or deception.'" 463 U.S. at 654. The additional factor needed to show that a "tip" is a *fraudulent* breach, *Dirks* explained, is "'where one takes advantage' of 'information intended to be available only for a corporate purpose *and not for the personal benefit* of anyone.'" *Id.* (emphasis added) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S.E.C. 933, 936 (1968)). The inquiry is not whether the insider lacked a corporate purpose—as would be true with almost any disclosure to someone who might trade—but whether he sought personal gain. Secrist, the insider, did not commit fraud because he "received no direct or indirect personal benefit from the disclosure." *Id.* at 666 n.27.

The Court was articulating a standard for securities "fraud" that could subject people with no duty of confidentiality to the source of the

information to criminal prosecutions and SEC enforcement actions. It intended to capture only the most serious misconduct—to provide a circumscribed "guiding principle" for market participants, not a vague and sweeping measure for liability. *Id.* at 664. Under that principle, a disclosure is a fraudulent breach only when the tipper's motive is pecuniary: An insider can be liable under Rule 10b–5 "only where he fails to disclose material nonpublic information before trading on it and thus makes secret profits." *Id.* at 654 (quotation marks omitted); *see id.* at 666 n.27 ("inside trading for personal gain is fraudulent"). Notably, the motive of the tipper in *Merrill Lynch*, which the Court quoted in defining fraudulent breach, was pecuniary (broker commissions or other compensation), not some intangible benefit. 43 S.E.C. at [*2].

2. The government contends that an insider's disclosure of "material nonpublic information to his 'tippee' with the understanding that it would be used for securities trading purposes" manifests the "deception necessary to establish fraud" and satisfies all elements of a §10(b) violation. U.S.Br.24 (quotation marks omitted). But under this analysis, *Dirks* would have come out the other way, because Secrist disclosed information about the suspected fraud intending that Dirks would "unload" his client's large holdings so that Equity Funding's stock price "would fall precipitously." 463 U.S. at 669 (Blackmun, J., dissenting).

To avoid this flaw in its theory, the government maintains that Secrist had a corporate purpose because his motive was "'to expose the

[corporate] fraud.'" U.S.Br.21 (quoting 463 U.S. at 667), 41 n.8. But instigating a dramatic sell-off caused Equity Funding to go into receivership—hardly a benefit to the shareholders. 463 U.S. at 650. The tip advantaged Dirks' clients, who profited nearly $17 million from "worthless" securities, *Dirks v. SEC*, 681 F.2d 824, 831 (D.C. Cir. 1982), but not the other shareholders who unwittingly purchased or held the worthless stock. This sort of selective disclosure would be a breach of fiduciary duty. *See* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 713 n.210 (1995). Furthermore, Secrist provided the confidential information shortly after Equity Funding had fired him. *Dirks*, 681 F.2d at 829. This suggests that one of his motives was retaliation, and raises the question whether a former manager could have a corporate purpose for such a disclosure.

The *Dirks* Court did not find that Secrist had a corporate purpose; it merely held that Secrist did not receive a personal benefit and thus did not deceive or defraud anyone. 463 U.S. at 666 n.27. *Accord United States v. O'Hagan*, 521 U.S. 642, 663 (1997) (no §10(b) violation in *Dirks* because Secrist did not act for "personal profit").

3. The government contends that the pecuniary gain standard is inconsistent with *Dirks*' "gift" language. U.S.Br.34-35. But *Dirks* clearly held that "personal gain" to the tipper is required and emphasized pecuniary gain. The Court could not have intended to equate "gift" situations in which the tipper receives nothing with personal benefit to the tipper.

The Court introduced these concepts as "facts and circumstances that *often justify...an inference*" of a breach of duty. 463 U.S. at 664 (emphasis added). In other words, they are something less than proof of personal benefit itself, which is how the Court described "pecuniary gain" and "future earnings" in that same paragraph. The Court intended gift and intention-to-benefit situations to be *evidence* that the tipper could be motivated by pecuniary gain, but contemplated that additional evidence would be needed to show the tipper's profit motive. For example, if the tipper owes money to a friend and provides confidential information for trading to the friend in lieu of cash, the gift is evidence that, together with the loan, establishes the tipper's pecuniary benefit motive.[1]

The government's position, by contrast, strips *Dirks*' gift sentence and "personal benefit" discussion of all substance. The government posits that "a gift of information for trading intrinsically involves a personal benefit," U.S.Br.24, and the tipper's reasons for making the gift and relationship to the tippee are irrelevant. *Id.*25, 27-28. If so, why did the Court say that assessing whether personal benefit is established "will not always be easy for courts," 463 U.S. at 664? And why did the Court devote an entire section of its opinion (III.C) to how to apply the test? The government also states that the phrase "trading relative or friend" "did not state a limiting principle." U.S.Br.27. But the Court expressly rejected the

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[1] The government incorrectly assumes that the pecuniary gain test does not capture tips to pay debts or compensation. U.S.Br.25.

SEC's position, because, like the government's here, it *lacked* a "limiting principle." 463 U.S. at 664. The *Dirks* Court crafted a limited personal benefit requirement to cabin the tipping offense, not as a malleable weapon for the government to expand as it sees fit. This Court should interpret that requirement narrowly, as the *Dirks* Court intended.

B. The Government's Position Is Inconsistent With §10(b)'s Text And Legislative History

1. The government contends that "the proscription on insider trading...is drawn directly from the text of Section 10(b)," U.S.Br.46, but points to no §10(b) language about insider trading. None exists. Pet.Br.20-21. By contrast, other countries that prohibit insider trading have enacted statutes with terms such as "insider" and "inside information" that delineate when trading is prohibited.[2]

The absence of relevant statutory language is why "[n]either section 10b nor Rule 10b–5 were cited to regulate insider trading until 1961, [twenty]-

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[2] "The United States stands alone in allowing judges to develop a common law prohibition against insider trading...from a general antifraud statute that does not even mention insiders, inside information, insider trading, or misappropriation." Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 211 (1998); *id.* & n.241-43 (discussing laws in UK, Italy and Germany); Directive 2003/6/EC of the European Parliament and of the Council, 2003 O.J. (L 96) 16 (directing EU members to prohibit individuals from trading on "inside information," a defined term).

seven years after the 1934 Act was passed and nineteen years after the SEC promulgated the rule." Stephen Bainbridge, *The Insider Trading Prohibition: A Legal and Economic Enigma*, 38 U. FLA. L. REV. 35, 38 (1986).

The *Chiarella* Court was certainly unable to locate the text the government purports to have unearthed. It said: "Although the starting point of our inquiry is the language of the statute, §10(b) does not state whether silence may constitute a manipulative or deceptive device....[N]either the legislative history nor the statute itself affords specific guidance for the resolution of this case." 445 U.S. 222, 226 (1980) (citation omitted). Instead, the Court fashioned a narrow "disclose or abstain" rule for corporate insiders under §10(b) using SEC and lower-court case law. *Id.* at 227-30. Similarly, when *Dirks* created a tipping offense, the Court did not purport to find it anywhere in §10(b)'s text. The Court conceived the offense and its elements based on *Chiarella*, cases cited therein, secondary literature, and other non-legislative sources. *See* 463 U.S. at 654-64. Neither *Dirks*' personal benefit test nor the government's "corporate purpose" test are anywhere in §10(b).[3]

The government insists that tipping is "deception," U.S.Br.12, 33, but that is hardly self-evident. Many commentators, including advocates of strong insider trading regulation, have observed that

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[3] The government selectively quotes *Central Bank*, U.S.Br.46, but that opinion nowhere suggests that the tipping offense derives from statutory language.

insider trading "is not really fraud, even though we have chosen to call it fraud in order to preserve and embellish the useful message of investor protection." Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 440 (2013); *see also* Pet.Br.22 & 56 n.13.[4]

2. Nor can legislative history rescue the government. The Exchange Act's drafters were aware of insider trading concerns, but chose to address them only via the §16(b) private civil remedy, and did not intend for §10(b) to proscribe insider trading. Pet.Br.21-22; Cuban.Br.4.

The government resorts to a handful of subsequent amendments and committee reports issued decades after the 1934 Act, none of which defines insider trading or remotely suggests congressional "endorsement" "that a tipper personally benefits by giving a gift." U.S.Br.29. The subsequent legislation merely expanded penalties for insider trading, clarified that the insider trading restrictions apply to Congress, and made other technical amendments. It mentions judicial insider trading jurisprudence, U.S.Br.29-31, but does not interpret it, let alone ratify *Dirks*' personal benefit test (or the government's revision). The reports are equally inapposite. They acknowledge "the lack of

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[4] *O'Hagan*, cited U.S.Br.33, is inapposite because it was not about tipping. The Court held that the defendant-misappropriator violated §10(b) because he himself traded. This was critical to the determination that the deceptive conduct occurred "in connection with the purchase or sale of [a] security," as §10(b) requires. 521 U.S. at 656.

consensus over the proper delineation of an insider trading definition." H.R. REP. NO. 100-910, at 11 (1988). And the reports emphasize and quote *Dirks*' pecuniary gain language without even mentioning the "gift" language. *See id.* at 9; H.R. REP. NO. 98-355, at 15 (1983).

Any "interpretation given by [a later] Congress (or a committee or Member thereof)" would be irrelevant to the intent of the Congress that enacted §10(b) anyway. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) (quotation marks omitted). "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 484-85 (1997) (quotation marks omitted). Indeed, *Central Bank* dismissed out-of-hand a similar claim about aiding and abetting, holding that the "acquiescence doctrine" has serious "limitations as an expression of congressional intent," 511 U.S. at 186, and "deserve[s] little weight in the interpretive process," *id.* at 187. "[W]hen...Congress has not comprehensively revised a statutory scheme but has made only isolated amendments,...[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quotation marks omitted).[5]

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[5] *Herman & MacLean v. Huddleston* observed in dicta that Congress "comprehensively revised the securities laws in 1975" without disturbing the judicially implied §10(b) private action. 459 U.S. 375, 385-86 (1983). The 1975 overhaul represented

Even if the legislative history clearly supported the government's argument, that would not justify creating a tipping crime out of statutory language that says nothing about insider trading. As Chief Justice Marshall stated, "[t]o determine that a case is within the intention of a statute, its language must authorize us to say so." *United States v. Wiltberger*, 18 U.S. 76, 96 (1820). The rule of lenity would trump any "indications in the statute's legislative history" supporting a harsher interpretation. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

* * *

Common-law doctrines about fiduciary and agency loyalty (U.S.Br.21-23) are equally irrelevant. *Santa Fe* expressly rejected the notion that any breach of fiduciary duty violates §10(b); *Dirks* and *Chiarella* reaffirmed that holding. The Court's more recent decisions reinforce the irrelevance of common-law doctrines. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Court held that "Section 10(b) does not incorporate common-law fraud into federal law." 552 U.S. 148, 162 (2008). In *Chadbourne & Parke LLP v. Troice*, the Court

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(continued...)

"the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's." H.R. REP NO. 94-229, at 91 (1975). Here, by contrast, the government cites a few minor tweaks—not a comprehensive reexamination that could signify an implicit ratification of a judge-made test that the legislation did not address.

refused to construe "the phrase 'in connection with' so broadly as to convert any common-law fraud that happens to involve securities into a violation of §10(b)." 134 S. Ct. 1058, 1069 (2014) (quotation marks omitted).

C. The Government Dodges The Vagueness Problem By Changing Its Position

The government has waived its new argument that "benefit" means "purpose." *See Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015). It previously conceded it had to prove a personal benefit, but argued that a tip to a friend or relative proved a "gift," which supposedly was a benefit to the tipper. Pet.Opp.13; Answer to Appellant's Supp. Br. at 8 (9th Cir. Dkt. No. 40-1); Proposed Jury Instructions at 39, 42 (N.D. Cal. Dkt. No. 80); *accord* Pet. for Writ of Cert., *United States v. Newman*, No. 15-137, at 18.

The apparent reason for the government's about-face is that its original gift/relationship theory (the Ninth Circuit's standard) violates due process. That theory is indeterminate because it fails to provide clear guidance on what relationships are sufficiently close, and what disclosures qualify as gifts. Pet.Br.40-44. As the Securities Industry and Financial Markets Association explains, its members "distill vast quantities of information" from many sources including company officers and employees. They need "clear and predictable" insider trading rules because the post-*Dirks* regime has led to "unpredictability and uneven application of the insider trading laws." SIFMA.Br.6, 8, 10, 11.

The government presumably devised its new lack-of-corporate-purpose test to overcome these serious due process problems. The only way it can resolve them without conceding that personal benefit must be narrowly defined is to make *all* tipping-and-trading criminal. For instance, if "corporate purpose" is the touchstone instead of "personal benefit," there is no need to ask which psychic or emotional benefits are sufficient. U.S.Br.41. Nor is there any need to assess the relationship between the tipper and tippee, because any—or even no—relationship will suffice. U.S.Br.27-28.[6]

The government's argument is profoundly wrong. *Dirks* did not enact a broad ban on "insider trading." It expressly reaffirmed *Chiarella*'s rejection of this very idea; held that "only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information," 463 U.S. at 657; and announced the personal benefit test to demarcate what trading violates §10(b). Jettisoning that

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[6] The scienter standard provides cold comfort. The government's assurance that "knowledge that the insider breached a fiduciary duty by disclosing material, nonpublic information for a personal benefit" is "a significant limitation on tippee liability," U.S.Br.44, rings hollow if "personal benefit" has no circumscribed meaning. Under its proposal, the government can simply argue that remote tippees always know their conduct is wrongful because there is no valid corporate purpose for disclosing material nonpublic information. This is exactly what the government contended in past efforts to water down personal benefit. *E.g.*, *United States v. Newman*, 773 F.3d 438, 454 (2d Cir. 2014) (government argued defendants "knew the insiders disclosed the information 'for some personal reason rather than for no reason at all'").

holding in favor a new, more expansive test would subvert the constitutional avoidance canon, which requires a "limiting construction"—not a broadening one. *Skilling v. United States*, 561 U.S. 358, 405 (2010).

II. THE GOVERNMENT'S BRIEF CONFIRMS THE NEED TO NARROWLY CONSTRUE PERSONAL BENEFIT

The government seeks unbounded license to prosecute people for trading with an informational advantage. Its present stance, like similar past efforts, shows why the Constitution commits the power to define crimes to the legislature, and why it requires Congress to provide clear notice about what conduct is barred. Because of these constitutional principles, this Court has repeatedly rebuffed analogous attempts to construe other broadly worded statutes expansively. The need for a narrow construction is even greater here, because §10(b) does not expressly prohibit *any* insider trading. The common-law development of insider trading law has lacked coherence because Congress has not made the policy choices necessary to provide clear guidance. Until Congress does so, this judicially created crime should be narrowly construed, with personal benefit defined as pecuniary gain.

1. The government's brief illustrates why it should not be given *carte blanche* to enforce a constantly evolving common law of insider trading. Its brief is the latest incarnation of a decades-long campaign to usurp the power to determine, *post hoc*, when investors can trade on informational

advantages. In the 1960s, the government tried to convert §10(b) into a broad ban on insider trading. This Court spurned that effort in *Chiarella*. Undeterred, the SEC tried to resurrect the parity-of-information rule, only to be rebuffed again in *Dirks*. After *Dirks*, the government still resisted this Court's careful limits on insider trading liability. It continued to pursue an ever-expansive vision of insider trading proscriptions. It charged individuals who merely overheard confidential information;[7] invented entire new categories of supposedly fiduciary relationships;[8] argued that the fact of a tip proved a personal benefit and charged remote tippees who knew nothing about why the insider disclosed;[9] and claimed that any relationship, however slight, between tipper and tippee proved a personal benefit.[10] This assumption of authority was largely unchecked by compliant lower courts until the Second Circuit pushed back in *Newman*.

To maintain its broad *de facto* authority to decide after-the-fact what is illegal, the government has resisted legislation that would clearly define the

[7] *SEC v. Switzer*, 590 F. Supp. 756 (W.D. Okla. 1984).

[8] *E.g.*, *United States v. McGee*, 763 F.3d 304 (3d Cir. 2014) (members of Alcoholics Anonymous); *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (uncle-in-law and nephew-in-law); *SEC v. Conradt*, 947 F Supp. 2d 406 (S.D.N.Y. 2013) (friends who showed each other work emails); *United States v. Willis*, 737 F. Supp. 269 (S.D.N.Y. 1990) (psychiatrist-patient); *United States v. Reed*, 601 F. Supp. 685 (S.D.N.Y. 1985) (father-son).

[9] *E.g.*, *Newman*, 773 F.3d at 453-55; *see* Payton.Br.11-12.

[10] *See* cases cited Pet.Br.47-48.

insider trading offense. It has opposed enactment of an insider trading statute that would tell the public in plain terms what is legal, and what is not. In the 1980s, for instance, the SEC advocated greater penalties for insider trading, but opposed a statutory definition to maintain maximum flexibility to determine *ex post* whether insider trading was wrongful. *See generally* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 207, 224 n.317 (1990). The SEC opposed any bright-line rule because it would provide savvy investors with guidance on how to trade legally using nonpublic information. *Id.* Its explicit goal, in other words, was to prevent citizens from having crimes defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (quotation marks omitted). This also may explain why it has not promulgated a rule defining insider trading.

2. The government's brief is just the latest iteration of this campaign to control what insider trading is criminal. But the Constitution forbids boundless prosecutorial (or judicial) discretion to define a crime after the defendant's conduct has occurred. Penal statutes must define offenses with "sufficient definiteness" to prevent such "arbitrary and discriminatory enforcement." *Id.* at 402-03.

In part to ensure clear limits on penal sanctions, the Constitution prohibits common-law crimes. "[T]he legislature, not the Court,...is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95. "[B]efore one can be

punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). This Court has been particularly mindful of separation-of-powers concerns when interpreting §10(b), and has narrowly construed the statute in private actions, which were also judicially created. Pet.Br.37-39. A narrow construction of personal benefit is a constitutional imperative.

The familiar history of "honest services" fraud provides an instructive analogue. There too the government repeatedly attempted to deploy broad, seemingly indeterminate language to usurp the power to define the crime—until this Court held it in check. After 1909, the mail fraud statute criminalized schemes or artifices "to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *McNally v. United States*, 483 U.S. 350, 358 (1987). The government asserted that the statute covered schemes to deprive the public of the intangible right to have public officials perform their duties honestly. It therefore wielded the statute as a broad anti-corruption measure, even where the victim (the public) suffered no tangible loss. *Skilling*, 561 U.S. at 400-01.

The Courts of Appeals accepted the government's expansive view, *id.* at 401, but this Court disagreed. The Court applied the rule of lenity, and construed the statute narrowly. *McNally*, 483 U.S. at 359-61. The Court emphasized that Congress must speak "in clear and definite language," and refused to abide a construction that

"leaves its outer boundaries ambiguous." *Id.* at 360. The Court therefore read the statute as "limited in scope" to the protection of property rights. *Id.*

In response to *McNally*, Congress amended the statute to include fraudulent schemes for deprivation of "the intangible right of honest services." 18 U.S.C. §1346. The government persuaded the Court of Appeals that §1346 made any "undisclosed self-dealing by a public official or private employee" a federal crime. *Skilling*, 561 U.S. at 409. The Court once again disagreed. Acknowledging the "force" of Skilling's vagueness challenge, the Court narrowed the statute to the pre-*McNally* "core" of bribes and kickbacks to avoid striking it down as unconstitutional. *Id.* at 405-09.

Even after *Skilling*, the government sought to invoke honest services fraud as an unbounded anti-public-corruption tool. It argued in a bribery prosecution that "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to any event—counts as a *quo*." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016). The Court rejected that view. Invoking constitutional avoidance again, the Court adopted a limiting construction of what counts as a sufficient "official act." *Id.* at 2371-73. The Court reasoned that the government's interpretation "is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Id.* at 2372-73 (quoting *United States*

v. Stevens, 559 U.S. 460, 480 (2010)). A statute "that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 2373 (citation omitted).

3. The need for a scalpel is even greater here, because §10(b) does not mention insider trading or define its elements. This is not an ordinary case where "a court interprets or applies...a statute as written." U.S.Br.47. The government cannot sweep away constitutionally derived interpretive principles by pretending that §10(b) directly speaks to the question presented, when it obviously does not.

When Congress expresses policy choices through legislation, courts can perform their proper role, which is to "interpret" that legislation, "not to make policy." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Here the words of §10(b) shed no light, and no statute provides direction. The issue is the meaning of an earlier Court decision (*Dirks*), which was interpreting another decision (*Chiarella*), which found no guidance in the statute, its legislative history, or the SEC's implementing rule, and instead cited lower-court and administrative decisions to fashion a narrow proscription on certain conduct that the Court thought should be barred by the statute.

4. There is much disagreement among regulators, judges, and scholars about what harms insider trading causes, if any, and how it should be regulated, and the answers are not as clear-cut as

the government suggests.[11] Congress is responsible for making these policy choices, but it has never identified the social harm from insider trading or expressed a policy reason for prohibiting it. Its failure to provide this critical policy guidance has made it more difficult for courts to perform their proper role. Consequently, insider trading law has developed in a haphazard (and not entirely coherent) manner. *See, e.g.*, Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179 (1991); Painter, 84 VA. L. REV. at 163-87.

The government's new theory invites more of the same. It could lead to results inconsistent with its suggested policy rationales for regulating insider trading. The government's proposal turns on whether a disclosure is for a corporate purpose. But corporations may determine that using confidential corporate information to trade *is* in the corporation's interest. Corporate officers might selectively leak information to favored investors, influential analysts, or others likely to trade—perhaps to cushion the impact of a forthcoming negative

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[11] Painter, 84 VA. L. REV. at 219-20; *see also* Stanislav Dolgopolov, *Insider Trading*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 276-80 (David R. Henderson ed., 2d ed. 2007) (surveying scholarly literature for and against insider trading regulation). For instance, empirical work demonstrates that insider trading makes markets more efficient by enabling stock prices to reflect relevant information sooner, and contradicts government claims that insider trading undermines market integrity and investor confidence. Dolgopolov at 278-79. For additional sources disagreeing with the government's policy arguments, *see* Cuban.Br.11-12; Cato.Br.16-19; Pet.Br.27n.7.

earnings announcement.[12] Or a corporation could adopt a policy permitting a new CEO to trade on inside information as part of the compensation package, making insider trading an emolument of corporate office. The government's corporate purpose test does not satisfy concerns for the integrity of the markets, investor confidence, or the unfairness of traders using information not accessible to others.

5. Unless Congress decides the reasons for regulating insider trading and enacts a statute identifying its elements, courts lack the appropriate tools to implement the will of Congress. *See generally* Hervé Gouraige, *Do Federal Courts Have Constitutional Authority to Adjudicate Criminal Insider-Trading Cases?*, 69 RUTGERS L. REV (forthcoming Dec. 2016). That is why the Court should narrowly construe the personal benefit requirement.

The pecuniary gain standard is the appropriate limiting rule. It provides clear guidance that enables investors to determine whether their trading is legal based on objective facts, as *Dirks* instructed. 463 U.S. at 663. The pecuniary gain standard is more faithful to *Dirks*' emphasis on "gain," "profit," and benefit to the tipper; its reliance on lower-court and administrative decisions where insiders exploited confidential information for money; and this Court's other insider trading

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[12] This routinely occurs at some companies even though in some circumstances it might violate Regulation FD. *E.g.*, *Newman*, 773 F.3d at 454-55.

precedents. Pet.Br.29-33. A financial motive test is also supported by decisions interpreting other statutes, where the Court has required a showing that the alleged fraudster acted to obtain money or property *for himself*. Pet.Br.33-34. The government sidesteps that common thread and argues that *the victim's* loss need not be tangible, U.S.Br.36, but that is beside the point.

6. Petitioner was sent to prison for a common-law crime. The government has unabashedly endorsed this common-law process for years and continues to do so. The SEC's Chair recently testified in favor of retaining "the common law"; as one Member of Congress aptly responded, "[I]f we are talking about sending people to jail for long periods of time, it is probably better that [Congress] do[es] that." *Examining the SEC's Agenda, Operations, and FY 2016 Budget Request: Hearing Before the H. Comm. on Fin. Servs.*, 114th Cong. 39-40 (2015).

"It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis." *United States v. Kozminski*, 487 U.S. 931, 951 (1988). Yet that is precisely how insider trading law has developed for the past 36 years. It is a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737

(1975). The Court should refrain from further judicial expansion of criminal §10(b) liability, unless and until Congress expressly authorizes it.

III. SALMAN'S CONVICTIONS SHOULD BE REVERSED

The government does not even try to defend Petitioner's convictions under the pecuniary gain standard, and it is indisputable that Maher Kara had no financial motive for disclosing the information. That is why the district court found that Maher "did not engage in this conduct for self-benefit, [and] did not gain anything," and the SEC concluded that Maher should not be permanently barred from the securities industry Pet.Br.5 & n.1-2.

The judgment cannot stand under the novel lack-of-corporate-purpose approach either, because the jury was never asked to consider this theory, which the government has argued for the first time in its merits brief to this Court. The Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella*, 445 U.S. at 236. Doing so "offends the most basic notions of due process," even if the "jury might...have reached the same verdict" on the new theory. *Dunn v. United States*, 442 U.S. 100, 106-07 (1979).[13]

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[13] There is also no legal basis to expand the tipping crime to cover "remote tippees" who have not participated in the tipper's breach of duty. The government does not dispute Salman's lack of involvement in the breach and offers no meaningful response to Petitioner's authorities. *See* Pet.Br.58-61. Neither *Dirks* nor

* * *

Profiting from inside information is unsavory and perhaps immoral. But no one should be sent to prison for conduct that Congress did not clearly criminalize. As this Court recently observed in a similar context:

> [T]his case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation...leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

McDonnell, 136 S. Ct. at 2375. The same is true of §10(b), a statute that does not address, much less prohibit, Petitioner's conduct:

> Depending on the circumstances, and even where permitted by law, one's trading on material nonpublic information is behavior that may fall below ethical standards of conduct. But in a statutory area of the law such as

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(continued...)

Bateman Eichler (cited U.S.Br.43) addresses remote tippees, and both cases state that tippees must directly participate in a fiduciary breach and are less culpable than tippers.

> securities regulation, where legal principles of general application must be applied, there may be significant distinctions between actual legal obligations and ethical ideals.

Dirks, 463 U.S. at 661 n.21 (quotation marks omitted).

Dirks' tipping crime should be confined to disclosures motivated by pecuniary gain. Any broader construction would violate the Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
DANIEL J. O'NEILL
SHAPIRO ARATO LLP
500 Fifth Avenue
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

JOHN D. CLINE
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery Street
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

Counsel for Petitioner
Bassam Yacoub Salman

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In The Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONER

THAYA BROOK KNIGHT
ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Avenue NW
Washington, DC 20001
(202) 842-0200
tknight@cato.org

BRADLEY J. BONDI
Counsel of Record
MATTHEW V.H. NOLLER
MICHAEL D. WHEATLEY
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000
bbondi@cahill.com

Counsel for Amicus Curiae Cato Institute

May 13, 2016

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

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INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies, established in 1989, seeks to restore the principles of constitutional government that are the foundation of liberty. Cato's Center for Monetary and Financial Alternatives was established in 2014 to reveal the shortcomings of today's monetary and financial-regulatory systems and to identify and promote alternatives more conducive to a stable, flourishing, and free society. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because it implicates separation of powers, the constitutional right of individuals to receive fair notice of conduct Congress has proscribed, and the functioning of the free market. Cato submits this brief to demonstrate how the Ninth Circuit's misreading of Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange

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[1] Pursuant to Rule 37.3(a), a letter of consent from the respondent to the filing of this brief has been submitted to the Clerk. The petitioner has filed a blanket consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to fund its preparation or submission.

Commission Rule 10b-5 upsets the separation of powers, violates Petitioner's right to fair notice, and threatens market efficiency.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court once observed that, when "deal[ing] with private actions under SEC Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975). The Court's observation is equally true of liability under Rule 10b-5, 17 C.F.R. § 240.10b-5, for insider trading. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), from which Rule 10b-5 derives, does not expressly prohibit insider trading. Instead, this Court's insider-trading decisions have cultivated a judicial oak of their own by defining the circumstances under which insider trading violates Section 10(b)'s amorphous prohibition of securities fraud. *See Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980).

As judge-made law, Rule 10b-5's insider-trading prohibition must be interpreted narrowly to avoid separation-of-powers concerns and to ensure that individuals facing potential criminal sanctions have fair notice of what conduct is proscribed. To be illegal under the statute, insider trading must be fraudulent. Trading that is merely unfair is not illegal, and this Court

has resisted the temptation to expand insider trading beyond the perimeters of fraud. *See Dirks*, 463 U.S. at 657 (rejecting argument that "the antifraud provisions require equal information among all traders"). The Ninth Circuit in this case sprinkled the government's fertilizer on the judicial oak to create a mammoth and artificial creation that rests on the ambiguous concept of fairness. *See, e.g.*, Petition of the United States for Rehearing & Rehearing *En Banc* at 23, *United States v. Newman*, 773 F.3d 438 (Nos. 13-1837(L), 13-1917(CON)) (advocating for "fairness (and the perception thereof) in the securities markets."). By upholding the government's expansive interpretation of the personal benefit requirement associated with Section 10(b) and Rule 10b-5, the Ninth Circuit misinterpreted the linchpin linking insider trading to a finding of fraud – the receipt of a personal benefit in exchange for material, nonpublic information – that this Court identified in *Dirks*. The Ninth Circuit crossed the boundary from interpreting the law to writing it and endorsed a dangerous legal scenario in which market participants are denied fair notice of the type of behavior that is proscribed.

By contrast, in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015), the Second Circuit properly interpreted *Dirks*'s personal-benefit element to require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. That holding is consistent with the familiar understanding of fraud as the use of deception

to receive "something of value." *McNally v. United States*, 483 U.S. 350, 358 (1987), *superseded by statute on other grounds*, 18 U.S.C. § 1346. This Court recognized as much when it held that insider trading is fraud only when the insider "makes 'secret profits'" from trading on or disclosing inside information. *Dirks*, 463 U.S. at 654. The personal-benefit requirement captures those "secret profits" and nothing more expansive.

In conflict with the Second Circuit, the Ninth Circuit below held that a personal benefit exists any time an insider provides material, nonpublic information to a friend or relative, even if the insider receives nothing whatsoever in return. That holding goes beyond the text of Section 10(b) by criminalizing conduct no one would consider fraudulent, and it denies market participants fair notice of what actions are prohibited. The Ninth Circuit's approach would criminalize a vast, unpredictable range of conduct, unconstitutionally requiring investors "to speculate as to the meaning" of Section 10(b) and Rule 10b-5. *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999).

The vagueness of the Ninth Circuit's holding is particularly harmful in the context of securities markets, where investors need clear standards by which to measure their conduct. When outside investors trade in a company's securities based on rumors, tips, or so-called buzz about the company, they potentially improve market efficiency by revealing additional and sometimes better information about the company's value. Indeed, rumors and tips are so critical to

the functioning of the securities markets that the *Wall Street Journal* devotes the "Heard on the Street" column to them. The Ninth Circuit's decision, which subjects outside investors to an unpredictable risk of criminal liability, will chill beneficial market activity.

The lower court's holding subverts the text and spirit of *Dirks*. The Ninth Circuit nevertheless claimed that this result was dictated by a single, isolated sentence in *Dirks*. *United States v. Salman*, 792 F.3d 1087, 1092-93 (9th Cir. 2015) (holding personal benefit exists where an "insider makes a gift of confidential information to a trading relative or friend" (quoting *Dirks*, 463 U.S. at 664)). That sentence, when placed back in the context from which the Ninth Circuit uprooted it, provides no support for the decision below. The Court should reverse that ruling and return *Dirks*'s "judicial oak" to its proper place in the legal landscape.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION MISINTERPRETS *DIRKS*

This Court recognized in *Dirks* that "it is essential . . . to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules." 463 U.S. at 664. To provide that guidance, the Court held that a tippee does not violate Section 10(b) and Rule 10b-5 by trading on inside information unless he knows the information originated

with an insider who disclosed it in exchange for a personal benefit. *Id.* at 660-62. The Ninth Circuit below held that an insider receives a personal benefit any time he discloses information to a family member or friend who trades. The Ninth Circuit is mistaken. A fair reading of *Dirks* confirms the Second Circuit's holding that a disclosure to a friend or relative does not satisfy the personal-benefit requirement absent "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452.

To be illegal under Section 10(b) and Rule 10b-5, insider trading must "defraud investors." *Dirks*, 463 U.S. at 666 n.27 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)). "[T]he words 'to defraud' . . . 'usually signify the deprivation of *something of value* by trick, deceit, chicane or overreaching.'" *McNally*, 483 U.S. at 358 (emphasis added) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). For that reason, an insider does not commit fraud unless he exploits inside information to "make[] 'secret profits.'" *Dirks*, 463 U.S. at 654. *Dirks* makes clear that the personal-benefit requirement exists to capture those fraudulently obtained "secret profits." *See id.* at 663 (giving as examples of personal benefits "pecuniary gain or a reputational benefit that will translate into future earnings"); *id.* at 664 (quoting a commentator describing tipping liability as prohibiting an insider from "in effect selling the information to its

recipient for cash, reciprocal information, or other things of value").

The Ninth Circuit stated that its decision follows from *Dirks*'s "clear holding" that "a gift of confidential information to a trading relative or friend" always involves a personal benefit. *Salman*, 792 F.3d at 1093 (quoting *Dirks*, 463 U.S. at 664). In context, however, *Dirks*'s reference to "a gift" does not expand the meaning of "personal benefit" beyond "secret profits" similar to pecuniary gain. The "gift" language appears as part of a broader discussion of the personal-benefit requirement and describes just one of several "facts and circumstances" that can "justify . . . an inference" of personal benefit. *Dirks*, 463 U.S. at 664. The sentence immediately following the "gift" language clarifies that a gift may indicate a personal benefit when "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* That is, a tip to a friend or relative violates Section 10(b) and Rule 10b-5 only when it is equivalent to the insider already having received "secret profits" by trading on the information himself. That may be true of some disclosures to friends and relatives, but it is by no means true for all. *See Newman*, 773 F.3d at 452-53.

The Ninth Circuit's *per se* approach is hard to reconcile with the SEC's judgment elsewhere that a mere disclosure of inside information between close family members is not always fraudulent. SEC Rule 10b5-2 provides that, under Rule 10b-5, a "duty of trust or confidence" exists between spouses, parents and children,

and siblings. Rule 10b5-2(b)(2), 17 C.F.R. § 240.10b5-2(b)(2): An insider does not commit fraud simply by disclosing inside information to someone with whom she shares a duty of trust or confidence, because she reasonably can expect the recipient of the information to keep it secret. *Cf. SEC v. Yun*, 327 F.3d 1263, 1273 (11th Cir. 2003) ("If the SEC can prove that [a] husband and wife had a history or practice of sharing business confidences, and those confidences generally were maintained by the spouse receiving the information, then in most instances the conveying spouse would have a reasonable expectation of confidentiality. . . ."). In the Ninth Circuit, then, an insider would automatically commit fraud by disclosing material, nonpublic information to her cousin who trades but, under Rule 10b5-2, not by disclosing the same information to her spouse who trades. That makes little sense. A more sensible rule, and the rule *Dirks* requires, is that a tip to anyone – spouse, cousin, friend, or stranger – is not criminal unless it involves "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452.

II. CONTRARY TO THE NINTH CIRCUIT'S DECISION, THE ELEMENTS OF ILLEGAL INSIDER TRADING MUST BE NARROW AND CLEAR

The law governing insider trading under Section 10(b) and Rule 10b-5 is almost exclusively judge-made. *United States v. Chestman*, 947 F.2d 551, 572 (2d Cir.

1991) (Winter, J., concurring in part and dissenting in part). Congress and the SEC have never defined illegal insider trading. Instead, they have "left to the courts" the task of deciding, on a case-by-case basis, when insider trading is and is not fraudulent. H.R. Rep. No. 98-355, at 13-14 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 2274, 2286-87. That is a hazardous undertaking. If not done cautiously, it risks upsetting the separation of powers by co-opting Congress's legislative authority. It also risks perpetuating vague, unpredictable standards of liability that do not provide fair notice of what conduct is prohibited, a particularly serious problem when the health of the securities markets depends on market participants having bright-line rules governing their conduct. For those reasons, judge-made law, such as the federal insider-trading ban, must be as narrow and clear as possible. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1110 (1991) (Scalia, J., concurring in the judgment).

The Second Circuit's decision in *Newman*, by tying the personal-benefit requirement closely to Section 10(b)'s prohibition on fraud, satisfies the need to make the elements of illegal insider trading narrow and clear. The Ninth Circuit's decision below, which expands insider-trading liability beyond the text of Section 10(b) and turns every family reunion and Wall Street water cooler into a potential crime scene, does not.

A. The Ninth Circuit's Decision Violates Separation Of Powers By Prohibiting Conduct Outside The Text Of Section 10(b)

The Framers designed a government in which the legislature, rather than the courts, "prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003). In interpreting the scope of Section 10(b) and Rule 10b-5, this Court has honored the Framers' design by "refus[ing] to allow 10b-5 challenges to conduct not prohibited by the text of the statute." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *see also Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977) ("[T]he language of the statute must control the interpretation of the rule[.]"). The Court has followed the same approach when dealing with insider trading. *See Dirks*, 463 U.S. at 666 n.27 ("[T]o constitute a violation of Rule 10b-5, there must be fraud."); *Chiarella*, 445 U.S. at 233-34 (rejecting "broad" insider-trading liability "absent some explicit evidence of congressional intent"); *cf. United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (approving misappropriation theory of insider trading because it "comports with § 10(b)'s language").

To avoid punishing conduct that Congress did not criminalize, courts must limit insider-trading liability to the fraudulent practices targeted in Section 10(b). *See Welch v. United States*, 136 S. Ct. 1257, 1268 (2016)

("[T]he separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact."). A violation of Rule 10b-5 is a criminal offense that carries a prison sentence of up to twenty years and a fine of up to $5 million, 15 U.S.C. § 78ff(a), and nothing in the text or history of Section 10(b) suggests an intent to prohibit all insider trading, *see* Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 55-59 (1980). In fact, Congress's decision to address insider trading specifically only in the limited circumstances covered by Section 16(b) of the 1934 Act, 15 U.S.C. § 78p(b), suggests Congress deliberately chose *not* to enact a broad insider-trading ban in Section 10(b). *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 319 (1981). As the Court emphasized in *Chiarella*, "the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit. Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." *Chiarella*, 445 U.S. at 234-35 (internal quotation marks and citations omitted).

The Ninth Circuit's decision impermissibly exceeds the text of Section 10(b) by criminalizing conduct no reasonable person would regard as fraudulent. Businesspersons and Wall Street professionals, like everyone else, often have conversations about work with friends and family. They may casually discuss or boast about their jobs in break rooms, bars, or gyms, or on golf courses, softball fields, or basketball courts. In

any one of these conversations, they might disclose inside information. While such loose talk may be careless, no one would call it fraud – except, apparently, the Ninth Circuit. Under the Ninth Circuit's decision, every bit of water-cooler small talk or locker-room braggadocio could give rise to strict criminal liability. Even insiders who disclose information for honorable reasons are at risk. For example, *Dirks* held that an insider who disclosed confidential information to expose a fraud "clearly" did not receive a personal benefit. 463 U.S. at 666-67. In the Ninth Circuit, that same insider, acting with the same innocent purpose, could be a criminal if he disclosed the information to a relative instead of a stranger. This bizarre result cannot be squared with the text of Section 10(b).

B. The Ninth Circuit's Decision Violates Due Process And The Rule Of Lenity By Adopting A Vague, Unpredictable Approach To Illegal Insider Trading

Without a narrow, clear judicial interpretation, Section 10(b) and Rule 10b-5 would be unconstitutionally vague as applied to insider trading. Neither law so much as mentions insider trading; their language "is at best a general authorization to the SEC and to the courts to fashion rules founded largely on those tribunals' judgments as to why insider trading is or is not fraudulent, deceptive or manipulative." *Chestman*, 947 F.2d at 573 (Winter, J., concurring in part and dissenting in part). "Fraud," "deception," and "manipulation" are broad categories with many possible applications.

The "unavoidable uncertainty and arbitrariness of adjudication" inherent in an unconstrained inquiry into whether any given act of insider trading falls within those categories violates due process. *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015).

This Court in *Dirks* recognized the special risks of uncertainty and arbitrary enforcement posed by applying Section 10(b) and Rule 10b-5 to insider trading. The Court was concerned that, "[w]ithout legal limitations, market participants are forced to rely on the reasonableness of the [government's] litigation strategy, but that can be hazardous." 463 U.S. at 664 n.24. The Second Circuit's rule in *Newman* addresses that concern by limiting insider-trading liability to the familiar bounds of common-law fraud. *Newman*, 773 F.3d at 452 ("[I]n order to form the basis for a fraudulent breach, the personal benefit . . must be of some consequence."); *see McNally*, 483 U.S. at 358-60 (interpreting mail-fraud statute narrowly based on traditional definition of fraud to avoid vagueness). The Ninth Circuit's approach, in contrast, creates countless areas of uncertainty. To take just one example, if tipping a "friend" is *per se* illegal, *Salman*, 792 F.3d at 1093, what type of friend qualifies? Is it enough that the insider and tippee were roommates? *See SEC v. Payton*, 97 F. Supp. 3d 558 (S.D.N.Y. 2015). That they "were alumni of the same school or attended the same church"? *Newman*, 773 F.3d at 452. That the tippee is the insider's longtime barber? *See SEC v. Maxwell*, 341 F. Supp. 2d 941 (S.D. Ohio 2004). The uncertainty only gets worse as

the final tippee becomes farther removed from the insider? What if the insider tips his barber, who tips his wife, who tips her favorite hairstylist? Can the hairstylist trade? There is no way for anyone to know until the government files charges. *See* Transcript of Oral Arg. at 49, *Newman*, 773 F.3d 438 (Judge Parker: "[W]e sit in the financial capital of the world. And the amorphous theory that you have . . . tried this case on, gives precious little guidance to all of these institutions, all of these hedge funds out there who are trying to come up with some bright line rules about what can and cannot be done. And your theory leaves all of these institutions at the mercy of the government. . . .").

Contrary to *Dirks*'s goal of providing clear guidance to market participants, the Ninth Circuit's approach to illegal insider trading "ha[s] no limiting principle." *Dirks*, 463 U.S. at 664. If a personal benefit exists for *any* disclosure to a friend or relative, the ephemeral benefit of feeling happy about helping a friend or relative could itself be a personal benefit. But that theory cannot sensibly be limited to friends and relatives, or to any particular emotion. The insider in *Dirks* disclosed inside information to expose a corporate fraud. 463 U.S. at 667. But suppose a whistleblower were motivated not just by a desire to expose the fraud, but also in part by a desire to punish the corporation's CEO for denying him a promotion. Under the Ninth Circuit's reasoning, the pleasure the whistleblower felt at his successful revenge could land him in federal prison. If that were all it took to transform "clearly" innocent conduct, *see Dirks*, 463 U.S. at 667,

into criminal fraud, "the personal benefit requirement would be a nullity," *Newman*, 773 F.3d at 452.

Finally, if any doubts remain about the proper scope of the federal insider-trading ban, they should be resolved against the Ninth Circuit's decision by "the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). The rule of lenity is especially relevant here, where the government's reading of Section 10(b) and Rule 10b-5 could expose individuals to 20-year prison sentences and $5 million fines for saying the wrong thing at a family reunion or birthday party. *See id.* (invoking rule of lenity to avoid "20-year prison sentences" for broad range of conduct). For such severe penalties to be appropriate, traders must have clear notice that their conduct is unlawful. *See Newman*, 773 F.3d at 450 ("[*M*]*ens rea*, which requires that the defendant know the facts that make his conduct illegal, is a necessary element in every crime. Such a [*mens rea*] requirement is particularly appropriate in insider trading cases where we have acknowledged 'it is easy to imagine a . . . trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful.'"). The Court should not construe Section 10(b) and Rule 10b-5 to criminalize the mere sharing of information with friends or relatives when that conduct is not "plainly and unmistakably proscribed," *Dunn v. United States*, 442 U.S. 100, 112-13 (1979) (internal quotation marks omitted), by those laws' antifraud language.

The Court's treatment of a vague anti-corruption law in *Skilling v. United States*, 561 U.S. 358 (2010), is instructive. In *Skilling*, the Court interpreted the federal statute criminalizing "honest-services" wire fraud, 18 U.S.C. § 1346, to avoid due-process and rule-of-lenity concerns. *Id.* at 402-11. Rather than apply the statute in its full "potential breadth," the Court "pare[d]" the statute's application to its "core" purpose of prohibiting bribes and kickbacks. *Id.* at 403-04. "Reading the statute to prohibit a wider range of offensive conduct," the Court held, "would raise the due process concerns underlying the vagueness doctrine" and violate the rule of lenity. *Id.* at 408, 410-11. As in *Skilling*, due process and the rule of lenity require limiting the judge-made insider-trading prohibition to Section 10(b) and Rule 10b-5's "core" of prohibiting securities fraud. "'If Congress desires to go further, . it must speak more clearly than it has.'" *Id.* at 411 (quoting *McNally*, 483 U.S. at 360).

C. The Ninth Circuit's Vague, Unpredictable Approach To Illegal Insider Trading Will Chill Beneficial Economic Activity

In addition to the Ninth Circuit's decision's constitutional problems, the decision will have negative real-world consequences for financial markets. Because "most investors . . . rely on [a] security's market price as an unbiased assessment of the security's value," *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*,

133 S. Ct. 1184, 1192 (2013), it is important that a company's stock price reflect as much information about the company as possible. *See* Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 866 (1983) ("The more accurately prices reflect information, the better prices guide capital investment in the economy."). Confidential information about a company can be revealed to the market in two main ways. First, sources like market analysts and the *Wall Street Journal*'s "Heard on the Street" column can report rumors or information about a company to investors. *See Dirks*, 463 U.S. at 658-59 (discussing analysts). Second, investors who come into possession of rumors or inside information about a company can incorporate their information into the company's stock price by trading. Easterbrook, *supra*, at 327. The Ninth Circuit's decision threatens to chill both of these accepted methods for disclosing information by leaving market analysts and investors with no idea "where the line is between permissible and impermissible disclosures and uses." *Dirks*, 463 U.S. at 658 n.17. Rather than risk prosecution under a vague criminal law, analysts might refrain from disclosing information, and investors might refrain from trading. The result will be less accurate security prices, less informed investors, and less efficient markets.

In *Dirks*, this Court recognized that "market efficiency in pricing is significantly enhanced by [market analysts'] initiatives to ferret out and analyze information" about companies. *Id.* (quoting Raymond L. Dirks, 21 S.E.C. Docket 1401, 1406 (1981)). Analysts'

efforts to gather information from insiders and disclose that information to their clients are "necessary to the preservation of a healthy market" because the "information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities." *Id.* at 658-59. *Dirks* rejected the government's "imprecise" theory of insider-trading liability because, the Court held, the imprecision "could have an inhibiting influence on the role of market analysts." *Id.* at 658 & n.17. The Ninth Circuit's vague approach creates the same problem. Insiders and market analysts will worry that they know each other well enough to qualify as "friends" under the Ninth Circuit's holding. *See Newman*, 773 F.3d at 452 (addressing government's argument that personal benefit existed between analysts who "were not 'close' friends, but had known each other for years"). As a result, insiders will be reluctant to share information with analysts, and analysts will be reluctant to disclose what, if anything, they learn. That information, and its further analysis and aggregation, will remain hidden from the market. *See Chestman*, 947 F.2d at 578 (Winter, J., concurring in part and dissenting in part) (explaining that "a rule commanding equal access [to information] would result in a securities market governed by relative degrees of ignorance").

Even in the absence of market analysts, outside investors who have information or rumors that are not reflected in a company's stock price can move the price closer to its correct value by trading based on their information. More generally, empirical studies confirm

that private information is incorporated quickly into the stock price, even with a small number of informed investors trading. As informed investors' trades begin to move the stock price, the changing price sends signals about the stock's correct value to uninformed investors. The uninformed investors then trade based on those signals, and the stock price ultimately ends up closer to its correct value. *See, e.g.*, Martin Barner et al., *On the Microstructure of Price Determination and Information Aggregation with Sequential and Asymmetric Information Arrival in an Experimental Asset Market*, 1 ANNALS FIN. 1 (2005); Ji-Chai Lin & Michael S. Rozeff, *The Speed of Adjustment of Prices to Private Information: Empirical Tests*, 18 J. FIN. RES. 143 (1995). And by moving the company's stock price closer to its correct value, informed outside investors limit true insiders' ability to profit from their inside information, thereby transferring the value of the information from insiders to the investing public. *See* Henry G. Manne, INSIDER TRADING AND THE STOCK MARKET 60-61, 65, 84 (1966); *see also* Easterbrook, *supra*, at 329-30 ("The informed traders thus protect the uninformed.").

These benefits of trading by informed outsiders are well-recognized. *See* Stanislav Dolgopolov, *Insider Trading*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2007), http://www.econlib.org/library/Enc/InsiderTrading.html ("There is little disagreement that insider trading makes securities markets more efficient [in terms of pricing accuracy]."). But under the Ninth

Circuit's holding, outsiders will be hard-pressed to decide which tips or rumors are fair game to trade on and which are not. An investor who hears a rumor about tech stocks from his banker cousin or gets a recommendation to invest in "plastics" from a family friend may well be free to trade – but then again, he may not be, and the consequences of guessing wrong could be dire. Without any way to "be sure when the line [between legal and illegal conduct] is crossed," *Dirks*, 463 U.S. at 658 n.17, the investor might choose not to trade, even when doing so would be both lawful and beneficial to the market. The resulting market harm can and should be avoided by reversing the Ninth Circuit's decision.

CONCLUSION

In *Chiarella*, this Court first rejected the government's attempt to create a broad insider-trading prohibition based on "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information." 445 U.S. at 233. The Court did so again in *Dirks*, "repudiating" the government's argument that Section 10(b) and Rule 10b-5 "require equal information among all traders." *Dirks*, 463 U.S. at 657. Now, more than 30 years after *Dirks*, the song remains the same. The government argues for an expansive insider-trading prohibition, relying not on the text of Section 10(b) and Rule 10b-5 but on an ambiguous concern with "fairness (and the perception thereof) in the securities markets." Petition of the United States for Rehearing & Rehearing *En Banc*

at 23, *Newman*, 773 F.3d 438 (Nos. 13-1837(L), 13-1917(CON)). The government's error is the same as it has always been: Section 10(b) and Rule 10b-5 neither criminalize unfairness nor guarantee equal access to information. They prohibit fraud. *Dirks*, 463 U.S. at 654-58.

The Ninth Circuit's endorsement of the government's position that it can prove illegal insider trading simply by proving that an insider provided confidential information to a friend or relative who trades untethers the elements of this "crime" from the traditional understanding of fraud, replacing the offense Congress enacted in Section 10(b) with a judge-made crime of indeterminate scope. That holding usurps Congress's constitutional authority to define crimes, violates due process by denying market participants fair notice of what conduct is prohibited, and threatens the nation's markets. This Court should reverse.

Respectfully submitted,

THAYA BROOK KNIGHT
ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Avenue NW
Washington, DC 20001
(202) 842-0200
tknight@cato.org

BRADLEY J. BONDI
Counsel of Record
MATTHEW V.H. NOLLER
MICHAEL D. WHEATLEY
CAHILL GORDON
& REINDEL LLP
80 Pine Street
New York, NY 10005
(212) 701-3000
bbondi@cahill.com

Counsel for Amicus Curiae
Cato Institute

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BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MARK CUBAN IN SUPPORT OF PETITIONER

STEPHEN A. BEST
BROWN RUDNICK, LLP
601 Thirteenth Street, NW
Suite 600
Washington, DC 20005
(202) 536-1700

RALPH C. FERRARA
Counsel of Record
ANN M. ASHTON
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue, NW
Suite 600 South
Washington, DC 20004
(202) 416-6800
rferrara@proskauer.com

Attorneys for Amicus Curiae Mark Cuban

265696

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICUS CURIAE[1]

Mark Cuban is a successful businessman, an investor, the owner of several business ventures, including the NBA's Dallas Mavericks, and one of the stars of the popular television show "Shark Tank." He was pursued by the Securities and Exchange Commission for over six years based on a novel theory of insider trading. A jury ultimately exonerated Mr. Cuban on all charges, but not without significant cost—both monetary and personal—to Mr. Cuban. Mr. Cuban knows all too well from personal experience that if the Government labels an individual an "insider trader," no matter how novel the theory of liability, the individual is faced with a decision whether to succumb to a settlement despite not believing that the conduct violated the law (and thereby suffer the attendant financial, injunctive and reputational costs) or mount an expensive and time-consuming defense that is likely to take years to resolve.

While Mr. Cuban was fortunate enough to have the financial resources to defend himself, others may not be so fortunate. Mr. Cuban has an interest in seeing that traders are not swept into the Government's insider trading dragnet based on novel theories of liability that have no footing in the securities statutes or this Court's

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and his counsel made a monetary contribution intended to fund the brief's preparation or submission. Respondent's letter consenting to the filing of this amicus brief, as well as Petitioner's letter granting blanket consent to the filing of *amicus curiae* briefs, are on file with the Clerk.

precedent. Mr. Cuban submits that the Court should reject the holding of the Ninth Circuit in this case, which adopts the Government's overly expansive view of insider trading and outlaws activities that are legal under established precedent.

SUMMARY OF ARGUMENT

No one should be prosecuted for conduct that Congress is either unwilling or unable to define. However, that is precisely what is occurring with respect to the Department of Justice's and the SEC's pursuit of insider trading claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). In the decision below, the Ninth Circuit allowed an expansion of insider trading parameters that is not covered by the statute.

Although Congress has been repeatedly challenged and even beseeched to provide a definition of insider trading as it relates to Section 10(b), it has declined to do so. Instead of a statutory definition with boundaries, there is a patchwork of judicial decisions cobbling together, on a case-by-case basis, what conduct gives rise to liability. This has resulted in an "intolerable degree of uncertainty." Harvey L. Pitt & Karen L. Shapiro, *The Insider Trading Proscriptions Act of 1987: A Legislative Initiative for a Sorely Needed Clarification of the Law Against Insider Trading*, 39 Ala. L. Rev. 415, 416 (1988).

In the decision below, the Ninth Circuit affirmed the Government's pursuit of insider trading claims even though there was no "exchange [between the alleged tippee and alleged tipper] that is objective, consequential and represents at least a potential gain of a pecuniary or

similarly valuable nature." *See United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015). The holding of the Ninth Circuit is wrong and should be rejected.

ARGUMENT

I. PEOPLE WHO TRADE LAWFULLY SHOULD NOT HAVE TO FEAR BECOMING A DEFENDANT IN A GOVERNMENT PROCEEDING

While it might seem to go without saying that an individual who lawfully trades his or her stock should not suddenly find his or her name in the caption of a Government enforcement proceeding, that is precisely what happened to Mr. Cuban. He spent over six years and millions of dollars defending against novel insider trading allegations by the SEC. While he was offered the opportunity to settle for much less than his defense costs, he refused because he had done nothing wrong. Although a jury fully vindicated Mr. Cuban after only four hours of deliberation, Mr. Cuban's defense to the SEC's charges was not without significant costs. Not only was he forced to spend a considerable amount of time and money on his defense, but he also lived under the bright light of the SEC's allegations while the case was pending. For example, he was jeered when attending Dallas Mavericks games by chants of "insider trading." *See* Lisa Shidler, *Persecuted Mark Cuban Prosecutes the SEC and Wins Some Mea Culpas from Christopher Cox*, RIABiz (Dec. 10, 2014), http://www.riabiz.com/a/4938825004482560/persecuted-mark-cuban-prosecutes-the-sec-and-wins-some-mea-culpas-from-christopher-cox.

Congressional codification of exactly what constitutes insider trading is required. Absent that, the courts—and this Court in particular—must continue to reject the Government's attempts to expand insider trading proscriptions through litigation pursuant to which innocent traders find themselves ensnared in insider trading prosecutions.

II. OTHER THAN IN THE LIMITED CONTEXT OF SHORT-SWING TRADING, CONGRESS PROVIDED NO PROSCRIPTION AGAINST INSIDER TRADING IN THE EXCHANGE ACT

While Congress was aware of concerns regarding insider trading at the time the Securities Exchange Act of 1934 was enacted, *see, e.g.*, Donald Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 386 (1953), the Act addresses only a narrow subspecies of insider trading—namely, where a director, beneficial owner, or officer personally achieves short-swing profits by using nonpublic information to make both a purchase and a sale of company stock within six months of each other. Securities Exchange Act of 1934, ch. 404, tit. 1, § 16(b) (codified as amended at 15 U.S.C. § 78p(b)). And even in that situation, only the company (or a shareholder acting derivatively on behalf of the company) may sue for disgorgement; there is no criminal liability, and the SEC may not bring an action to enforce the prohibition. *Id.* More important, Congress specifically rejected the concept of tippee liability for insider trading.[2]

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2. A draft version of the Exchange Act would have barred certain corporate insiders from sharing confidential information with outsiders, and tippees who traded on illegally disclosed information

Despite the lack of Congressional proscription (or even intent) regarding insider trading beyond the limited context of Section 16(b), the SEC has not hesitated to argue that Section 10(b)'s fraud provision and Rule 10b-5 broadly proscribe "insider trading." Addressing the issue in *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), the SEC held that a trader committed a fraud—and thus violated Rule 10b-5—whenever he or she traded while knowing material nonpublic information that the counterparty did not. In effect, the SEC demanded a parity of information between traders: A trader either had to disclose his informational asymmetry or abstain from trading. *See Chiarella v. United States*, 445 U.S. 222, 227 (1980).

This expansive view of insider trading had no basis in the Exchange Act—indeed, it went well beyond Congress' narrow proscription in Section 16(b) against short-swing trades by a limited group of insiders. The SEC nevertheless managed to convince lower courts to adopt its "disclose or abstain" rule, and many successful (but baseless) insider trading actions were brought accordingly. *See, e.g., SEC v. Tex. Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968).

The SEC pressed its flawed parity-of-information rule for nearly two decades. It jettisoned the rule only when this Court reversed a decision of the Second Circuit to hold that information parity is "inconsistent with the

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would have had to disgorge to the issuer profits realized within six months of the disclosure (unless they could establish certain affirmative defenses). *See Blau v. Lehman*, 368 U.S. 403, 411-12 & n.12 (1962) (citing H.R. 7852, 73d Cong. § 15(b); S. Rep. 2693, 73d Cong. § 15(b)). But even this limited provision for tippee liability was eliminated from the Act prior to enactment. *Id.*

careful plan that Congress has enacted for regulation of the securities markets." *Chiarella*, 445 U.S. at 235. The *Chiarella* Court explained that Congress did not outlaw all forms of insider trading but only those that constitute fraud. *Id.* Trading on nonpublic information is fraudulent only when the investor has an independent duty under the common law to disclose that information or abstain from trading. *Id.* By contrast, the SEC's parity-of-information rule had created a "general duty between all participants in market transactions to forgo actions based on material, nonpublic information" and thus "depart[ed] radically" from both the Exchange Act and established fraud doctrine. *Id.* at 233.

Despite the setback in *Chiarella*, the SEC continued to press for expanded insider trading proscriptions. Three years after *Chiarella*, this Court again took up the issue in *Dirks v. SEC*, 463 U.S. 646 (1983). There, the SEC had charged an analyst with insider trading after he had received and passed on to traders information from insiders concerning corruption at a financial firm. *Id.* at 648-49. The SEC's position was that the analyst automatically inherited the insiders' common law duty not to trade on confidential information by virtue of having received information from those insiders. *Id.* at 655-56. In other words, the SEC believed that every tippee is subject to the parity-of-information rule. *Id.*

Once again, this Court rejected the SEC's view of insider trading as overly expansive. After repeating *Chiarella*'s holding that there can be no liability for insider trading unless there is a fraud, *id.* at 666 n.27, the Court held that a tippee does not *per se* acquire a duty to disclose or abstain whenever he acquires insider information, *id.* at

659. To the contrary, a tippee "assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information *only* when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 660 (emphasis added); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 313 (1985) (explaining that *Chiarella* and *Dirks* make clear that "a tippee's use of material nonpublic information does not violate § 10(b) and Rule 10b-5 unless the tippee owes a corresponding duty to disclose the information").

History demonstrates that the Government will relentlessly push to expand the outer limits of what constitutes insider trading until it is reined in. But expanding the reach of the insider trading laws is the purview of Congress, not of the Executive Branch or the courts. *See, e.g., Norwood v. Kirkpatrick*, 349 U.S. 29, 40 (1955) (holding that a court's role is to "interpret [a statute,] not to expand and enlarge upon it"). And time and again, Congress has declined to define insider trading.

III. DESPITE HAVING MANY OPPORTUNITIES, CONGRESS HAS FAILED TO CODIFY OR OTHERWISE DEFINE INSIDER TRADING

Beginning in 1969, a group of esteemed securities academics and practitioners, led by Harvard Professor Louis Loss, drafted the American Law Institute's Federal Securities Code ("ALI Code"). The ALI Code, completed in 1978, was an attempt to re-codify the six federal securities statutes into a single comprehensive code. *See* Miriam R. Albert, *Company Registration in its Historical Context:*

Evolution Not Revolution, 9 U. Miami Bus. L. Rev. 67, 78-79 (2001). Section 1603 of the ALI Code specifically prohibited insider trading. *See* 2 ALI Fed. Sec. Code § 1603 (1978). Section 1603(b) defined insiders to include an expansive group of individuals (including both direct and indirect tippees) and proposed to codify the "concept of an insider's affirmative duty not to trade without disclosure." *See id.* § 1603 cmts. 2(e), 3(e).

The SEC endorsed the ALI Code, *see* Statement Concerning Codification of the Federal Securities Laws, Securities Act Release No. 33,6242 (Sept. 22, 1980), and in 1980 it was presented to Congress. Despite formal approval by the ALI, endorsement by the SEC, and support of the American Bar Association, the ALI Code was never enacted into law by Congress. Albert, 9 U. Miami Bus. L. Rev. at 80-81.

Congress next had an opportunity to address insider trading when it passed the Insider Trading Sanctions Act of 1984, a law that permits the SEC to impose a treble damages sanction on an individual who tips or trades while in possession of material nonpublic information in violation of the Exchange Act. *See* 15 U.S.C. § 78u. Congress specifically declined to define insider trading, however, apparently to avoid a debate over the definition that could have stalled passage of the entire legislative package. *See* Harvey L. Pitt, et al., *Problems of Enforcement in the Multinational Securities Market*, 9 U. Pa. J. Int'l L. 375, 382 n.11 (1987).

Yet another opportunity for Congressional action arose in June 1987, when Senators Donald Riegle and Alfonse D'Amato took the issue head on in introducing the Insider Trading Proscriptions Act of 1987. At the Senators' request, the SEC submitted a proposed definition of insider

trading drafted by the Ad Hoc Legislative Committee on Insider Trading, chaired by Harvey Pitt, the agency's former General Counsel who served as its Chairman from 2001 to 2003. *See* Jonathan R. Macey, Cato Policy Analysis No. 101, *SEC's Insider Trading Proposal: Good Politics, Bad Policy*, Mar. 31, 1988; Oliver P. Colvin, *A Dynamic Definition of and Prohibition Against Insider Trading*, 31 Santa Clara L. Rev. 603, 619-20 (1991). The definition was not adopted. *See* H.R. Rep. No. 100-910 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043.

Congress also considered adoption of an insider trading definition when it enacted the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988). This act added Section 20A to the Exchange Act to create an express private right of action for individuals who trade contemporaneously with an insider trader. *See* Fred D'Amato, *Comment: Equitable Claims to Disgorged Insider Trading Profits*, 1989 Wis. L. Rev. 1433, 1439 & n.29 (1989). In declining to adopt a definition for insider trading, the House Report of the Committee on Energy and Commerce explained that

> the court-drawn parameters of insider trading have established clear guidelines for the vast majority of traditional insider trading cases. . . . Accordingly, the Committee does not intend to alter the substantive law with respect to insider trading with this legislation. The legal principles governing insider trading cases are well-established and widely-known.

H.R. Rep. No. 100-910, at 11, *reprinted in* 1988 U.S.C.C.A.N. 6048.

At the time that statement was made, the "court-drawn parameters of insider trading" were those set out by this Court in *Chiarella* and *Dirks*. Thus, while Congress determined not to codify an insider trading definition, its citation to "court-drawn parameters" indicates an endorsement of the *limitations* that the Court had adopted in those cases. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("[i]n view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the [proposed] bills . . . provides added support for concluding that Congress acquiesced in the IRS rulings").

IV. RESPONDENT MAY NOT CREATE THE LAW OF INSIDER TRADING BY INCREASINGLY PURSUING PROSECUTIONS BASED UPON EXPANDED THEORIES OF LIABILITY

The lack of statutory guidance regarding insider trading is made all the more problematic by the ambitious stance of Department of Justice, egged on by the SEC in its own cases (and now by the Ninth Circuit), to take every opportunity to seek an expansion of the parameters of prohibited insider trading by bringing claims based on novel theories for which there is no precedent. Without definitive guidance as to what is a violation and what is not, well-meaning innocent individuals are left in the untenable position of having to worry that what is (and should be) a lawful transaction today will suddenly be alleged by the Government to violate the federal securities laws tomorrow.[3]

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3. Nor is the SEC willing or able to provide timely guidance to those who take the time to inquire whether specific conduct is

The Department of Justice and the SEC, in their ever-broadening campaign against insider trading, seem to have lost sight of the fact that the underlying goal of their enforcement should be to assure that the markets are fair and equitable so that companies and investors are able to participate with confidence, thus encouraging capital formation. Companies need capital to grow, and investors need to know that the companies in which they invest, and the markets in which they transact, will treat them fairly. Pursuing individuals under novel theories does nothing to improve the fairness of the markets.

Indeed, there is no definitive evidence that insider trading creates any inequity in the market. As the late-Professor Henry Manne, a founder of the law and economics discipline, concluded in 1966, the "only stock market participants who are likely to benefit from a rule of preventing insider trading are the short-term speculators

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prohibited. When Mr. Cuban tried to obtain information directly from the SEC regarding whether certain trading constituted illegal insider trading, he was told he could call the SEC's Division of Trading and Markets regarding submission of a no-action letter. http://qz.com/250097/watch-mark-cubans-tirade-against-the-sec-over-protocol-for-insider-trading-avoidance/ (Aug. 15, 2014). Upon calling the number provided, he reached an electronic answering service and was required to leave a voice mail with his request. *Id.* He received a response to his voice mail, referring him to the 1980 Securities Release No. 6269, which sets out the procedure for obtaining a no-action or interpretative letter from the SEC's Division of Corporation Finance. https://www.youtube.com/watch?v=9fDiVXpWp1U (Aug. 14, 2014). In this age of twitter, apps, and instant messaging, it seems that the SEC could provide a more expeditious way of assisting individuals wend their way through the insider trading minefield that it and the Department of Justice have created.

and traders, and not the long-term investors who are regularly stated to be the objects of the SEC's solicitude." Henry G. Manne, *In Defense of Insider Trading*, 44 Harv. Bus. Rev. 113, 114 (1966). Professor Manne posited that a long-term investor "normally sell[s] for reasons unrelated to the insider's trading, and would be selling in any event." *Id.* at 115. Such an investor would be "indifferent to the identity of his buyer" and actually "may benefit from the insider's buying on good news, as the average price received may be higher with than without the insider trading." *Id.* While a debate on the issue has raged on since this assertion, others have more recently taken up the position that insider trading does not undermine investor confidence. *See, e.g.*, Stephen Bainbridge, *Insider Trading: An Overview* (2000), http://ssrn.com/abstract=132529 (concluding that "it is difficult to see why insider trading should undermine investor credibility of the securities market"). Others have gone so far as to assert that a ban on insider trading actually has a detrimental effect on the market. *See, e.g.*, Jeffrey A. Miron, *An Economic Defense of Insider Trading* (2012), http://atlassociety.org/commentary/capitalism-and-morality/capitalism-morality-blog/4932-an-economic-defense-of-insider-trading (arguing that ban on insider trading "leads to less efficient allocation of the economy's capital").

It is not the purpose of this brief to argue definitely for any of these positions. However, given this debate, the Government's laser focus on this issue and attempts to expand its coverage are entirely misplaced. *See, e.g.*, Roberta S. Karmel, *A Critical Look at SEC Insider Trading Policies*, N.Y.L.J., Feb. 19, 2015, at p. 3, col. 1. In 2014, in deciding *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the Second Circuit agreed. While cited as

a landmark decision regarding insider trading, in fact the Second Circuit did nothing more than appropriately reject the Government's attempt to expand the parameters of prohibited insider trading based on unprecedented novel theories with no statutory or judicial basis.[4]

V. THE NINTH CIRCUIT INAPPROPRIATELY REJECTED THE SECOND CIRCUIT'S HOLDING REGARDING THE PERSONAL BENEFIT REQUIREMENT

A year after *Newman* was decided, the Ninth Circuit—in a decision authored by Judge Jed S. Rakoff, Senior District Judge for the Southern District of New York, sitting by designation—issued the decision now before the Court. Judge Rakoff had already signaled his disagreement with the Second Circuit's *Newman* decision. *See SEC v. Payton*, 97 F. Supp. 3d 558 (S.D.N.Y. 2015) (Rakoff, J.) (while paying lip-service to *Newman*'s "more onerous standard of benefit," finding that allegations made by the SEC similar to those rejected by the Second Circuit in *Newman* were sufficient to plead benefit). *Cf. United States v. Whitman*, 904 F. Supp. 2d 363, 371 n.6 (S.D.N.Y. 2012) (Rakoff, J.) (characterizing as "Delphic" the Second Circuit's holding regarding the personal benefit required in insider trading as set out in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012)).

The Ninth Circuit's decision authored by Judge Rakoff declined to follow *Newman* "[t]o the extent *Newman* can

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4. "The Government's overreliance on our prior dicta merely highlights the doctrinal novelty of its recent insider trading prosecutions." *Newman*, 773 F.3d at 448.

be read to go so far" as to endorse Mr. Salman's argument that, "because there is no evidence" that the alleged tipper received "at least a potential gain of a pecuniary or similarly valuable nature . . . in exchange for the inside information, or that Salman knew of any such benefit, the Government failed to carry its burden." Appendix to the Petition for Writ of Certiorari ("Pet. App.") 3, 15-16. The Ninth Circuit thus based its holding entirely on the relationship between the alleged tipper and alleged tippee. The problem with the Ninth Circuit's decision—as recognized by the Second Circuit in coming to the opposite conclusion—is that it affirms a criminal conviction that has no basis in statutory law or in this Court's decisions addressing insider trading.

VI. RESPONDENT'S PROPOSED DIMINUTION OF WHAT IS NEEDED TO DEMONSTRATE PERSONAL BENEFIT MUST BE REJECTED

As Mr. Salman correctly observed in his Petition for a Writ of Certiorari, "[i]f a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses." Pet. 2. However, a careful reading of this Court's decision in *Dirks*—which is the basis of the Ninth Circuit's decision—makes clear that the Ninth Circuit's decision in *Salman* is not correct and that a close family relationship does not by itself establish a personal benefit.

In *Dirks*, the Court held that a tippee "assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information *only* when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." 463 U.S. at 660 (emphasis added). To determine whether there

has been a breach of duty, a court must:

> focus on objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. There are objective facts and circumstances that often justify such an inference. For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

Id. at 663-64 (citing Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 348 (1979) ("[t]he theory . . . is that the insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself")) (other citations omitted).

The Ninth Circuit focuses on one sentence of the *Dirks* decision—that is, that the "elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend," Pet. App. 12 (quoting *Dirks*, 463 U.S. at 664)—to hold that a gift of material nonpublic information by an insider to a relative or friend constitutes a *per se* personal benefit to the insider. But

this sentence cannot be read in a vacuum. A "gift of the profits" is not a crime: only fiduciary breaches (or a "misappropriation") in making the trade may be. *See United States v. O'Hagan*, 521 U.S. 642 (1997). It cannot be that any purely emotional or familial benefit received by the tipper constitutes an "exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. To rule otherwise would eviscerate over three decades of judicial development of tippee liability since *Dirks*, and any tip to a friend or relative could suffice to jail the tipper irrespective of any receipt of concrete benefit from the exchange.

Consistent with principles of *ejusdem generis* and *noscitur a sociis*, the sentence should be read in the context of the entire opinion. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps (the doctrine of *noscitur a sociis*) [which] we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words").

When read in context, it is clear that the *Dirks* Court's inclusion of the sentence relied on by the Ninth Circuit was meant to explain that a relative or friend relationship can be evidence of the "*elements* of fiduciary duty and exploitation" and that an individual cannot do indirectly—through a straw—what he or she cannot do directly. *Dirks*, 463 U.S. at 664 (emphasis added). But the mere relationship, without some personal benefit being provided to the alleged tipper, is a not a breach of any duty.[5]

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5. The Ninth Circuit states that the Second Circuit "itself recognized that the 'personal benefit is broadly defined to include

Allowing the requirement of a personal benefit to be written out of existence as long as the tippee is a "trading relative or friend" also creates the problem of providing no guidance as to where the line is drawn on the relationship that triggers this exception. Are all relatives no matter how distant the connection included? For example, would a second cousin once removed be a "relative" for this definition? Application of the "friend" exception is even more problematic. Will the Department of Justice's (or the SEC's) next argument be that if a tipper is providing a tippee with information the two must *a fortiori* be friends (and thus nothing objective or consequential need have changed hands)?

The bottom line is that *Newman* correctly held that, under *Dirks*, tippee liability requires that the tipper receive a personal benefit that is concrete, objective and "of some consequence." *Newman*, 773 F.3d at 452; *see also United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) ("enter[ing] into a relationship of *quid pro quo* . . . could yield future pecuniary gain"). This requirement—that something "of some consequence" must have changed hands—should not be limited in its application to those situations in which the tippee is remote from the tipper;

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not only pecuniary gain, but also, *inter alia*, the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'" Pet. App. 16 (quoting *Newman*, 773 F.3d at 452). However, the next sentence of the Second Circuit's decision makes clear that such a relationship does not eliminate the requirement of a personal benefit: "[t]his standard, although permissive, does *not* suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Newman*, 773 F.3d at 452 (emphasis added).

it should apply to every alleged tipping transaction. To hold otherwise would allow the Government to get its nose under the tipper tent—which entry will be used by both the Department of Justice and the SEC to drive the herd through the village.

The Ninth Circuit's elimination of the benefit requirement based upon the relationship between the tipper and tippee must be reversed.

CONCLUSION

Amicus Mark Cuban is not suggesting that the bar against archetypal insider trading—trading by an insider (directly or indirectly) based on material nonpublic information in breach of the insider's fiduciary duty—should be discarded. But he strongly believes that insider trading should be defined in a manner that allows individuals to know with certainty whether a trade is legal or illegal *before* they engage in the transaction. While this Court cannot require Congress to act, it can rein in the Government's attempts to expand the reach of insider trading proscriptions by rejecting the Ninth Circuit's elimination of the personal benefit requirement and holding that the standard articulated by the Second Circuit in *United States v. Newman* is the correct one.

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Respectfully submitted,

STEPHEN A. BEST
BROWN RUDNICK, LLP
601 Thirteenth Street, NW
Suite 600
Washington, DC 20005
(202) 536-1700

RALPH C. FERRARA
Counsel of Record
ANN M. ASHTON
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue, NW
Suite 600 South
Washington, DC 20004
(202) 416-6800
rferrara@proskauer.com

Attorneys for Amicus Curiae Mark Cuban

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BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* RICHARD D. FREER IN SUPPORT OF RESPONDENT

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROGRAM
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Robert Howell Hall Professor of Law at the Emory University School of Law, and specializes in the fields of civil procedure, complex litigation, and business associations. Amicus teaches a course on business associations that covers the topic of insider trading, and is co-author of the course textbook, in addition to other scholarly publications on corporations and other business organizations. Amicus has no personal stake in the outcome of this case, but has an interest in seeing that the law of insider trading develops in a way that promotes fair and efficient markets.

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[1] Pursuant to Rule 37.6 *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission.

Respondent's letter consenting to the filing of this amicus brief, as well as Petitioner's letter granting blanket consent to the filing of *amicus curiae* briefs, are on file with the Clerk.

SUMMARY OF THE ARGUMENT

Petitioner advocates a radical departure from this Court's precedent and the weight of lower-court case law. He claims that the Ninth Circuit's decision in the case below turns the personal benefit test, announced in *Dirks v. SEC*, 463 U.S. 646 (1983), into a "nullity," Pet'r's Br. 16, and urges this Court to adopt the Second Circuit's holding in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015). Petitioner's arguments are unpersuasive. The decision below accords with a plain reading of *Dirks*. In contrast, the *Newman* decision contradicts *Dirks* and undermines important policy objectives embodied in the federal securities laws.

The tension between the decision below and *Newman* arises because the Second Circuit held that, to satisfy the personal benefit test, the government must provide evidence of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. Petitioner interprets this language to mean that an inference of personal benefit is only appropriate "where an insider provides a tip in exchange for a pecuniary gain." Pet'r's Br. 19. Yet, as the Ninth Circuit panel recognized in the case below, the pecuniary-gain standard proposed by Petitioner is incompatible with *Dirks*, which clearly stated that gratuitous tips

between relatives or friends can satisfy the personal benefit test.

There are compelling policy reasons for affirming the decision below and rejecting *Newman*'s restrictive interpretation of the personal benefit test. Proscribing insider trading is consistent with the congressional purpose underlying the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq.* (2012), which is to protect investor confidence in financial markets by prohibiting fraud in connection with the sale or purchase of securities. The *Newman* decision, if endorsed by this Court, would create a troubling loophole in the insider trading laws: unscrupulous tippers could avoid sanction by simply refusing any tangible, pecuniary benefit in exchange for providing the tip. If adopted, this standard would compromise the government's ability to prosecute insider trading. Such a result is anathema to Section 10(b), the key statutory provision of the Exchange Act.

Recent empirical studies counsel against restricting the scope of the insider trading prohibition. These studies undermine the market-efficiency justification for permitting insider trading. What's more, research indicates that, despite recent success by the SEC in deterring insider trading and enforcing the laws that prohibit it, the practice is quite prevalent—especially among individuals with close familial and social ties. Accordingly, it would be counterproductive for this Court to adopt the *Newman*

court's narrow interpretation of the personal benefit test. •

ARGUMENT

I. PROSCRIBING INSIDER TRADING ACCORDS WITH A CENTRAL POLICY UNDERLYING FEDERAL SECURITIES LAWS AND REGULATIONS: ENSURING FAIR MARKETS

In *United States v. O'Hagan*, this Court declared that an "animating purpose" of the Exchange Act is "to insure honest securities markets and thereby promote investor confidence." 521 U.S. 642, 658 (1997). The key statutory provision of the Exchange Act is Section 10(b), 15 U.S.C. § 78j(b) (2012),[2] which is "aptly described as a catchall [fraud] provision." *Chiarella v. United States*, 445 U.S. 222, 234–35 (1980). Its text makes clear that the enacting Congress intended for the SEC to promulgate rules

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[2] The relevant language from that provision states: "It shall be unlawful for any person to use or employ, in connection with the purchase or sale of any security any manipulative or deceptive device in contravention of such rules and regulations as the Commission may prescribe as necessary for the protection of investors." 15 U.S.C. § 78j(b) (2012).

and regulations that would help effectuate the aim of the law. Resp't's Br. 14.

Extending the prohibition on insider trading to gratuitous tipping is logical and necessary to effectuate the animating purpose of the Exchange Act. Adopting a pecuniary-gain standard, as Petitioner and his amici urge, would allow unscrupulous market participants to circumvent Rule 10b-5. A tipper could avoid criminal liability by simply refusing all forms of tangible compensation in exchange for the confidential information she provides; likewise, a tippee could keep herself out of jail by not providing the tipper with a pecuniary benefit (*i.e.*, money or other tangible assets). Whether it is a tipper or tippee who reaps illicit gains from insider trading, the harm to market integrity and investor confidence is the same: if ordinary investors perceive that corporate insiders or analysts can trade on nonpublic, material information with impunity, they will be reluctant to invest their money in the stock market.

Post-Exchange Act legislation makes clear that Congress intends to strictly curtail insider trading. Resp't's Br. 30. For instance, Congress passed laws in 1984 and 1988 seeking to deter insider trading by increasing penalties for insider trading violations and providing the SEC with more investigative authority. *See* Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 1984 U.S.C.C.A.N. (98 Stat.) 1264 (codified in scattered sections of 15 U.S.C.); Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No.

100-704, 1988 U.S.C.C.A.N. (102 Stat.) 4677 (codified in scattered sections of 15 U.S.C.).

More recent legislative enactments indicate that Congress's view on insider trading has not changed. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 2010 U.S.C.C.A.N. (124 Stat.) 1376, clearly evinces Congress's position that insider trading should be broadly prohibited. *See, e.g., United States v. Kluger*, 722 F.3d 549, 556 n.11 (3d Cir. 2013) (noting that the Dodd-Frank "guideline sentencing range increase [for organized insider trading schemes] reflects a continued push to ratchet up the penalties for insider trading"). Perhaps most tellingly, four years ago Congress passed the Stop Trading on Congressional Knowledge Act (STOCK Act), Pub. L. No. 112-105, 2012 U.S.C.C.A.N. (126 Stat.) 291, which explicitly prohibits members of Congress from exploiting nonpublic, material information for their personal benefit. Resp't's Br. 30; *See* Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 Wm. & Mary Bus. L. Rev. 159, 165 (2014) ("The preamble of the STOCK Act states that its purpose is 'to prohibit Members of Congress and employees of Congress from using nonpublic information derived from their official positions for personal benefit, and for other purposes.'") (citation omitted).

Finally, the 2002 enactment of Regulation FD ("Fair Disclosure"), 17 C.F.R. §§ 243.100, 242.101(c), (f) (2011), also weighs heavily against adopting the Second Circuit's *Newman* decision. Resp't's Br. 53–54.

Generally, "Regulation FD prohibits a company and its senior officials from privately disclosing any material nonpublic information regarding the company or its securities to certain persons such as analysts and institutional investors." *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694, 696 (S.D.N.Y. 2005). A forthcoming article by Professor Donna M. Nagy, a securities law scholar, discusses how the passage of Regulation FD undermines any argument that gratuitous tipping should be permitted: "[A]gainst the backdrop of Regulation FD, it now makes little sense to narrowly interpret the personal benefit element to facilitate what *Dirks* had viewed as the analyst's role in 'ferret[ing] out material nonpublic information from an issuer's officials.'" Donna M. Nagy, *Beyond Dirks: Gratuitous Tipping and Insider Trading*, 42 J. Corp. L. 1, 28 (forthcoming fall 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665820. Moreover, Professor Nagy disagrees with the *Newman* decision, going so far as to say, "The notion that courts should be interpreting Rule 10b-5 narrowly to facilitate an activity that is currently illegal is nothing short of absurd." *Id.* at 28–29.

The decision below comports with this Court's precedent and the congressional purpose undergirding Section 10(b). Although these reasons alone provide ample bases for affirming the decision below, recent research also indicates that strictly

proscribing insider trading is prudent from a socioeconomic perspective.

II. THE ECONOMIC BENEFITS OF STRICTLY PROSCRIBING INSIDER TRADING OUTWEIGH THE COSTS

Critics of the federal prohibition on insider trading argue that it should be permitted because insider trading promotes the efficient, or accurate, pricing of securities in capital markets.[3] But the United States is already home to some of the world's most efficient financial markets. At the same time, recent empirical studies indicate that insider trading has at least two adverse market effects. First, insider trading sometimes harms pricing efficiency due to a 'crowding-out' effect. Second, insider trading can incentivize managers to engage in earnings manipulation. Allowing insider trading to promote pricing efficiency therefore has costs that outweigh

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[3] Technically, "pricing efficiency" can refer to either informational or fundamental value efficiency, two related but distinct concepts: "A market is informationally efficient if investors cannot make abnormal returns by trading on public information ... a market is fundamentally efficient if prices accurately track the fundamental values of securities [*i.e.*, the true present value of expected future cash flows]." Ronald J. Gilson & Reinier Kraakman, *Market Efficiency After the Financial Crisis: It's Still a Matter of Information Costs*, 100 VA. L. REV. 313, 321 (2014).

any potential benefit, and undermines the integrity of our financial markets.

A. It Is Unnecessary To Allow Insider Trading To Promote Pricing Efficiency In United States Capital Markets

In his seminal work, *Insider Trading and the Stock Market* (1966), Dean Henry G. Manne posited that insider trading should be permitted because it brings relevant information to the market. *See Dirks,* 463 U.S. at 677 n.14 (1983) (Blackmun, J., dissenting) (citing Manne, *Stock Market, supra*, at 59–76, 111–146). *See also* Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 Stan. L. Rev. 857 (1983) (predicting that pricing efficiency improves when trading by insiders with superior information quickly and accurately impounds information into stock prices). In 2005, Dean Manne published an article reasserting his claim that insider trading promotes market efficiency: "The argument for a strong positive relationship between market efficiency and insider trading has proved to be very robust." Henry G. Manne, *Insider Trading: Hayek, Virtual Markets, and the Dog That Did Not Bark*, 31 J. Corp. L. 167, 169 (2005). Although Dean Manne's position has been substantiated by some empirical research in recent years,[4] his statements warrant three qualifications.

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[4] *See, e.g.*, Ji-Chai Lin & Michael S. Rozeff, *The Speed of Adjustment of Prices to Private Information: Empirical Tests*, 18 J. FIN. RES. 143 (1995).

First, even Dean Manne recognized that the empirical support for his claim was mixed. Indeed, in the same passage as the above-quoted statement, he cited an empirical study that found no material difference between trading by informed insiders and uninformed outsiders on pricing efficiency. *See id.* at 169 n.11 (citing Sugato Chakravarty & John J. McConnell, *Does Insider Trading Really Move Stock Prices?*, 34 J. Fin. & Quantitative Analysis 191 (1999)). Second, there are various means by which financial markets quickly and accurately incorporate new information into stock prices. Indeed, Dean Manne acknowledged that "other mechanisms play a significant role in stock pricing, such as the explicit public disclosure of new information, sanctioned transmittal of information to financial analysts, and the so-called 'derivative' trading that occurs after some form of market 'signaling.'" Manne, *Hayek, supra*, at 169–70. *See also* Burton G. Malkiel, *A Random Walk Down Wall Street* 246 (9th ed. 2007) (identifying several factors, other than insider trading, that economists believe promote market efficiency). Third, it is questionable whether any increase in market efficiency from restricting the scope of the insider trading laws would be more than marginal. *See* George W Dent, Jr., *Why Legalized Insider Trading Would Be a Disaster*, 38 Del. J. Corp. L. 247, 250 (2013) ("Even in the absence of insider trading, the market for frequently traded securities is already quite efficient. Any benefit from the additional accuracy caused by insider trading would probably be trivial.")

B. Insider Trading Can Harm Pricing Efficiency Due To A Crowding-Out Effect

Other recent empirical studies, published after Dean Manne's 2005 article, cast doubt on the notion that insider trading consistently improves stock market pricing efficiency. For instance, an empirical study published in 2007 examined the relationship between countries' insider trading laws and certain measures of economic health. *See* Laura N. Beny, *Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate*, 32 J. Corp. L. 237 (2007). The author found that "countries with more stringent insider trading laws have more dispersed equity ownership; more liquid stock markets; and more informative stock prices." *Id.* at 240–41. These findings undermine Dean Manne's recent claim that "there is almost no disagreement that insider trading does always push the price of a stock in the correct direction [*i.e.*, toward a price that reflects the corporation's fundamental value]." Manne, *Hayek, supra*, at 169.

A 2009 study by two finance scholars investigated whether a country's first-time enforcement of its insider trading laws improved stock price informativeness (*i.e.*, accuracy). *See* Nuno Fernandes & Miguel A. Ferreira, *Insider Trading Laws and Stock Price Informativeness*, 22 Rev. Fin. Studs. 1845 (2009). With respect to developed economies, the authors observed a positive relationship between stock price informativeness and a country's initial enforcement of its insider trading laws. These findings

supported an earlier theory that predicted insider trading could lead to *less* efficient market pricing due to a 'crowding-out effect.' According to that theory:

> Insider trading crowds out information collection by outside investors by limiting the gains available to outside investors. Market professionals devote fewer resources to collecting information once they know there is a high probability of trading with insiders who have superior knowledge. If the crowding-out effect (deterring others from obtaining information) dominates, insider trading can actually make stock prices informationally less efficient.

Id. at 1845 (citation omitted).

In other words, barring insider trading protects securities analysts' incentive to seek out new information about firms, which can then be traded upon to improve pricing efficiency in capital markets. *Id.* at 1847–48.

To be sure, these studies do not disprove that insider trading can improve pricing efficiency in certain financial markets within certain economies. Nonetheless, these findings illuminate an important point: in developed economies, insider trading can harm pricing efficiency. In light of these foregoing studies, as well as the recent empirical evidence

discussed below, the market-efficiency rationale for permitting insider trading is unpersuasive.

C. Managers' Ability to Trade On Inside Information Can Incentivize Earnings Manipulation

An empirical study published last year identifies yet another potential adverse effect of insider trading. Professors Anup Agrawal and Tommy Cooper analyzed the prevalence of insider trading at more than five-hundred "publicly traded U.S. companies that announced earnings-decreasing restatements from January 1997 to June 2002 to correct misstated financial statements." *See* Anup Agrawal & Tommy Cooper, *Insider Trading Before Accounting Scandals*, 34 J. Corp. Fin. 169, 169–170 (2015). The authors measured the purchases, sales, and net sales of stock by corporate insiders before and during periods where companies' earnings were materially misstated. *Id.* at 170. In certain sample subgroups, the authors found strong evidence that top managers sell more stock during misstated periods when the subsequent earnings restatement caused large stock price declines. *Id.* at 171. These findings suggest that "top managers' desire to sell their stockholdings at inflated prices is a motive for earnings manipulation." *Id.* at 188. Accordingly, the authors view the Sarbanes-Oxley Act's prohibition on insider selling during misstated financial periods as a justifiable restraint on insider exploitation of insider information. *Id.*

III. A PECUNIARY-GAIN STANDARD WOULD JEOPARDIZE THE SEC'S RECENT PROGRESS IN DETECTING AND DETERRING INSIDER TRADING BY CREATING A LOOPHOLE IN THE INSIDER TRADING LAWS

Petitioner cites the increasing number of insider trading cases brought by the government over the last decade as evidence of a relentless drive to expand the boundaries of the insider trading laws. Pet'r's Br. 45–48. He seems to suggest that the government is engaged in an insider trading witch-hunt. However, recent empirical research points toward an alternative explanation: Despite aggressive government enforcement of Rule 10b-5, illegal insider trading is not only difficult to detect and prosecute, but it is also prevalent within the securities industry. Yet, there is also evidence that the SEC's aggressive enforcement efforts helped to deter insider trading from 2003 to 2011. Accordingly, it would be counterproductive to restrict the scope of the insider trading laws, especially in light of another recent empirical study indicating that the vast majority of criminal insider trading schemes involve tippers and tippees who share familial or social ties.

A. Despite Aggressive Government Enforcement Of Rule 10b-5 Over The Last Decade, Illegal Insider Trading Remains Prevalent And Difficult To Detect And Deter

Professor Bainbridge, a securities law professor at UCLA, has discussed the difficult task facing prosecutors when they bring an insider trading case: "It is often very difficult to tell when insider trading is taking place, and even when insider trading is suspected. Further, it is very difficult to identify the responsible party if many people had access to the information." Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. Rev. 1589, 1623 (1999). Professor Bainbridge argues that, due to its comparative advantage vis-à-vis private parties in terms of expertise, resources, and access to evidence, the SEC should assume the difficult role of monitoring insider trading. *Id.*

Prof. Bainbridge also stated that an earlier estimate that "one in five cases of insider trading is successfully prosecuted" was "probably too high by several orders of magnitude." *Id.* Notably, the problem seems to have persisted despite an increasing number of insider trading prosecutions: Three recent empirical studies find evidence that insider trading remains quite prevalent and has increased over the last two decades. *See* Laura N. Beny & H. Nejat Seyhun, *Has Insider Trading Become More Rampant in the United States? Evidence from Takeovers* (U. Mich. Law Sch. Scholarship Repository Working

Paper No. 50, 2012), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1160&context=law_econ_current (analyzing data on pre-bid stock prices and call options in the context of corporate takeovers and finding evidence that illegal insider trading had increased between 1996 to 2011); Patrick Augustin et al., *Informed Options Trading Prior to M&A Announcements: Insider Trading?* (October 26, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441606 (estimating that 25% of M&A announcements are preceded by illegal insider trading); Agrawal & Cooper, *supra*, at 188 (concluding that insider trading is more prevalent than previously documented in academic literature in light of evidence that insiders "boldly trade on a crime for which they are potentially liable.")

However, despite the difficulties with detection and prosecution, a study published in 2015 suggests that the SEC's aggressive enforcement efforts from 2003 to 2011 helped deter the frequency of illegal insider trading. Diane Del Guercio et al., *The Deterrence Effect of SEC Enforcement Intensity on Illegal Insider Trading: Evidence from Run-up before News Events* (October 5, 2015), http://ssrn.com/abstract=1784528. The authors found evidence that, as the SEC increased the amount of resources (*e.g.*, budget and staffing) it expended in prosecuting insider trading, anticipatory run-up in stock prices prior to news events (*e.g.*, earnings statements and takeover announcements)—which is

an academically recognized proxy for deterrence—declined. *Id.* at 4.

In light of the natural limitations imposed by the difficulty of detection and enforcement, it would make scant sense for this Court to restrict Rule 10b-5's scope, especially with respect to tipping liability.

B. New Evidence Indicates That Tippers And Tippees Frequently Share Familial Or Social Bonds

Petitioner has interpreted the Second Circuit's *Newman* decision to mean that familial or social ties, standing alone, are insufficient to satisfy the *Dirks* personal benefit test. Yet a recent study suggests that this Court should be worried about precisely these kinds of relationships if the government is to continue safeguarding our financial markets.

In a forthcoming article, finance professor Kenneth R. Ahern found that 93% of tippers were either family members, friends, or business associates with the tippees to whom they illegally provided information. Kenneth R. Ahern, *Information Networks: Evidence from Illegal Insider Trading Tips*, J. Fin. Econ. (forthcoming 2016) (manuscript at 3), http://ssrn.com/abstract=2511068. This statistic is based on Professor Ahern's analysis of 183 insider trading networks using hand-collected data from all of the insider trading cases filed by the SEC and the Department of Justice between 2009 and 2013. *Id.* at 2. The author found evidence that "many inside traders share a common educational background,"

such as attending college or high school together. *Id.* at 4.•

These findings are striking. The *Newman* court suggested that a common educational background should not suffice for purposes of the personal benefit test. Yet, Professor Ahern's research indicates that such social ties are often the building blocks for criminal insider trading schemes. To avoid creating a loophole that would allow a prevalent form of insider trading to escape criminal sanction, it is imperative that this Court affirm the decision below, which held that evidence of a familial or social relationship can satisfy the personal-benefit test. *See* Resp't's Br. 48–49.

CONCLUSION

Strictly proscribing insider trading is consistent with the Exchange Act and subsequent legislative enactments. Since *Dirks*, Congress has reaffirmed its view that insider trading should be deterred by both civil and criminal enforcement. Moreover, recent academic literature and empirical evidence indicate that insider tipping and trading can cause adverse economic effects and, further, that it is quite prevalent despite increased enforcement of Rule 10b-5. This Court should affirm the decision below to protect the integrity of the United States' financial markets.

Respectfully submitted,

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROGRAM
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

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IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

IRA M. FEINBERG
Co-Chair, NYCDL
Amicus Committee
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

Counsel for New York Council of Defense Lawyers

MEIR FEDER
Counsel of Record
SAMIDH GUHA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Counsel for National Association of Criminal Defense Lawyers

(Additional counsel listed on inside cover)

JEFFREY L. FISHER
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
559 Nathan Abbott Way
Stanford, CA 94305

HENRY W. ASBILL
DAVID MORRELL
JONES DAY
51 Louisiana Avenue, N.W
Washington, DC 20001

Counsel for National Association
of Criminal Defense Lawyers

QUESTION PRESENTED

Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has approximately 9,000 direct members in 28 countries, and its 90 affiliated state, provincial, and local organizations consist of up to 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in this Court, the federal courts of appeals, and state high courts. NACDL's mission is to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, as well as the justice system as a whole.

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Petitioner's consent to the filing of *amicus* briefs is filed with the Clerk. *Amici* received Respondent's consent to file this brief by letter.

justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or by concurring or dissenting justices in cases such as *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016), *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

Amici's members frequently defend individuals against insider-trading charges. *Amici* have a particular interest in the properly limited interpretation of the criminal prohibition on insider trading, as well as in protecting against the unwarranted expansion of federal crimes, and the application of lenity principles to ambiguous criminal provisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 is an anti-fraud provision, proscribing the use of a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of any security. This Court has therefore emphasized that Section 10(b) does not criminalize all securities trading based on material, nonpublic information. *See Chiarella v. United States*, 445 U.S. 222, 233 (1980); *Dirks v. SEC*, 463 U.S. 646 (1983). Instead, what Section 10(b) proscribes is "fraud"—and trading on nonpublic information entails fraud only when there is some

fiduciary duty to disclose the information, such that trading without disclosure is misleading. *Chiarella*, 445 U.S. at 233. Such a disclosure duty exists, in turn, only when a corporate insider misuses corporate information for personal gain—to reap "secret profits" for himself. *Dirks*, 463 U.S. at 662. Accordingly, the line demarcating the boundary between fraudulent and non-fraudulent trading is the insider's misuse of information for personal tangible gain. Without such a benefit to the insider from his sharing of the information, there is no duty to disclose and thus no fraud.

The Court applied this principle to so-called "tippee" liability in *Dirks v. SEC*, holding that trading by a tippee—one who receives information shared by a corporate insider—can be fraud prohibited by Section 10(b), but only where the tippee knows that the corporate insider shared the information for personal gain. Absent such personal gain, there is no fiduciary duty to disclose, and therefore no fraud in violation of Section 10(b).

Despite this requirement, which *Dirks* intended to *cabin* Section 10(b) liability—and which is essential to limiting the crime of insider trading to what Congress actually prohibited, *i.e.*, financial fraud—the Ninth Circuit affirmed Petitioner's conviction for insider trading without finding that the tipper (Maher Kara) received any tangible benefit in exchange for disclosing the inside information. Instead, the court found it sufficient that Maher shared information with his brother with the intent to "benefit" his brother and "fulfill[] whatever needs he had." Pet. App. 12. By deeming such an amorphous, purely emotional benefit to satisfy *Dirks*,

the Ninth Circuit effectively negated the personal-benefit requirement as a meaningful limitation and resurrected the very equal-information rule this Court has repeatedly rejected as one unauthorized by Congress.

While *Dirks* contemplated that *some* gifts to family or friends could give rise to liability—such as where such gifts are used by the insider as a substitute for trading himself—it did not abandon the principle that personal gain by the insider, typically to reap "secret profits," is the touchstone. 463 U.S. at 664. A gift of information is accordingly not actionable unless it contemplates some tangible gain to the insider. *See United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014). Otherwise, the personal-benefit requirement of *Dirks* is a nullity. If the mere satisfaction of helping a family member or friend in some amorphous way is a sufficient personal benefit, then virtually *any* motivation for sharing information may qualify as well; the Government can always argue that the tipper obtained *some* satisfaction from his conduct. Yet that squarely conflicts with this Court's repeated guidance that Section 10(b) does not proscribe all trading on material, nonpublic information, even when such trading could be described as "unfair."

Further, even if Section 10(b) could plausibly be read to encompass the purely psychic or emotional benefits embraced by the Ninth Circuit, the rule of lenity independently forecloses such a result. That rule serves the twin aims of providing defendants notice of what is criminalized and ensuring that Congress, not courts, defines crimes. Because neither Congress nor the S.E.C. has ever defined the crime of

insider trading, and the Ninth Circuit's rule would criminalize a broad swath of conduct as to which Section 10(b) is at best ambiguous, the rule of lenity compels a narrower reading of that provision here.

The Ninth Circuit's interpretation also exacerbates the problems that attend overcriminalization more generally, as it grants prosecutors tremendous leverage to charge broadly and extract plea deals, including from those who have serious defenses but whose risk calculus is distorted by the uncertainty created by an amorphous personal-benefit standard. In recent years, this Court has repeatedly rejected the Government's aggressive interpretations of other federal criminal statutes that would have dramatically expanded the conduct covered by the statute and thereby granted prosecutors tremendous leverage. And Congress has declined to take any legislative action supporting the Government's desired interpretations. The Court should likewise reject the Government's overreaching and nearly unbounded interpretation of "personal benefit" in this case.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY EXTENDS THE CRIME OF INSIDER TRADING TO CONDUCT NEVER CRIMINALIZED BY CONGRESS.

1. This Court has consistently rejected the Government's entreaties to create a federal common law criminal prohibition outlawing all securities trading based on material, nonpublic information. Emphasizing that "neither the Congress nor the

Commission ever has adopted a parity-of-information rule," *Chiarella v. United States*, 445 U.S. 222, 233 (1980), this Court has made clear that insider trading cannot violate Section 10(b) unless it amounts to *fraud*; and that such trading can be fraud only if there is an independent fiduciary duty to disclose the information, such that trading without disclosure is misleading. *Id.* at 227-28. Even where such trading may be perceived as involving informational imbalances, Congress has criminalized only fraud, not unfairness: "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* at 232. There is therefore no "general duty to forgo actions based on material, nonpublic information." *Id.* at 233.

The "personal benefit" requirement is critical to this distinction between what Congress has actually criminalized—fraud—and trading that a jury might perceive as unfair but that is not fraud. This is because the duty to disclose that is a *sine qua non* of *fraudulent* insider trading arises only when the insider misuses corporate information for personal gain—where "the insider personally will benefit, directly or indirectly," from the "'use of inside information for personal advantage.'" *Dirks v. S.E.C.*, 463 U.S. 646, 662 (1983) (quoting *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 912, n. 15 (1961)). Absent such a "personal benefit," there is no duty to disclose and therefore no fraud.[2] Rigorous

[2] Any tippee liability is purely derivative of the corporate insider's breach of fiduciary duty and duty to disclose. Thus, only where the insider himself is exploiting the information for "personal gain" does the tippee inherit the *Cady, Roberts* duty not to trade on nonpublic information. *Dirks*, 463 U.S. at 662.

enforcement of the personal benefit requirement is therefore the only safeguard ensuring that the crime of insider trading is limited to cases of fraud, and is not extended—without any basis in the statute—to all trading based on nonpublic information.

In so holding, this Court has repeatedly rejected the Government's efforts to erase the critical distinction between criminal and noncriminal conduct. In *Chiarella*, the Court expressly rejected the SEC's position that any individual receiving inside information inherited a duty not to trade on it. 445 U.S. at 232-33. Subsequently, in *Dirks*, the first case addressing tippee liability, the Government took—and this Court rejected—a virtually identical position, "rooted in the idea that the antifraud provisions require equal information among all traders." 463 U.S. at 656-57. Again emphasizing that Section 10(b) is not a parity-of-information mandate, *id.* at 657, the Court held that tippees assume an insider's obligation to abstain from trading only where the insider breaches his own fiduciary duties by receiving a "personal benefit" in exchange for the information. *Id.* at 662-63. The fraudulent aspect of insider trading, the Court explained, derives from the "inherent unfairness" involved where an insider with fiduciary obligations to the corporation "takes advantage of information intended to be available only for a corporate purpose" and reaps "secret profits" as a result. *Id.* at 654.

2. Despite this Court's clear pronouncements in *Chiarella* and *Dirks* that Section 10(b) does not contain a parity-of-information rule, the Government's nearly unbounded interpretation of "personal benefit" would effectively impose such a

rule, and make its violation a federal crime. According to the Government, the personal-benefit requirement of *Dirks* is satisfied even by intangible and subjective emotional benefits, such as when an insider gives information to "a trading friend or relative *without any expectation of receiving money or valuables as a result.*" Petition for Writ of Certiorari at 18, *United States v. Newman*, 136 S. Ct. 242 (2015) (No. 15-137) (emphasis added). In short, the Government would have this Court dramatically expand the reach of a federal crime with an already tenuous foundation in statutory text, by redefining a fiduciary duty aimed at use of corporate information for personal profit as a much broader duty triggered by any putative emotional or psychological benefit. *See* Andrew N. Vollmer, *A Rule of Construction for* Salman (Mar. 18, 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749834 (arguing that the insider trading violation, like other products of judicial implication not rooted in statutory text, must be narrowly construed).

To be sure, *Dirks* contemplated that *some* gifts of information to family or friends could give rise to insider trading liability. 463 U.S. at 664. But it never suggested that this supplanted the touchstone principle that personal gain such as "secret profits" by the insider—whether obtained directly or indirectly—is necessary. *See id.* at 659 (insiders "may not give such information to an outsider for the same improper purpose of exploiting the information *for [the insiders'] personal gain*" (emphasis added)). Instead, *Dirks* identified gifts to family or friends as one way an insider may seek to evade restrictions on

trading himself. *See id.* at 664 ("The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."). Thus, while tipping with family or friends may take the form of a gift, it becomes actionable only where it contemplates an exchange of money or property to the insider. *See United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014).

A contrary conclusion would effectively negate the personal-benefit requirement of *Dirks*. If the mere satisfaction derived from helping a family member or friend is sufficient, there is no reason why sympathy for the plight of a stranger would not be as well. Nor, for that matter, is there a basis for distinguishing these psychological benefits from the satisfaction some may find in aiding law enforcement (which *Dirks* itself said was insufficient, 463 U.S. at 667), or in any other reason for sharing information. In all of these scenarios, the Government will be able to argue that some benefit was reaped by the tipper—some satisfaction obtained through the disclosure of information. In short, the Government can treat any *motivation* for sharing information as a benefit to the tipper. But if such ethereal benefits suffice, the personal-benefit requirement of *Dirks* is no requirement at all, as virtually any reason for tipping (apart from inadvertence or mistake) will qualify. Not to require more would thus effectively revive the very equal-information rule rejected in *Chiarella* and *Dirks*.

This becomes particularly obvious in light of the relationship between the breach of fiduciary duty requirement and the knowledge requirement. In *Dirks*, the Court held that tippee liability requires

knowledge that the tipper disclosed information in breach of a duty. 463 U.S. at 660. This specifically requires knowledge of the personal benefit received by the tipper, since the only breach of duty that supports tipper liability is the exchange of confidential information for a personal benefit. *See id.* at 659; *Newman*, 773 F.3d at 451. But if any ethereal benefit to the tipper satisfies *Dirks*, then the very act of disclosure of material nonpublic information would satisfy both requirements. Indeed, the government itself has suggested this. *See* Petition for Writ of Certiorari at 30-31, *United States v. Newman*, 136 S. Ct. 242 (2015) (No. 15-137). But, as the Court has made clear, disclosure of inside information—regardless of its value—is not itself a breach of fiduciary duty that supports liability under Section 10(b). *Dirks*, 463 U.S. at 661-62 ("All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders").

The amorphous definition of personal benefit advocated by the Government is particularly problematic because the dynamics of criminal prosecutions will inevitably lead, in practice, to criminalizing a broader scope of conduct than authorized by Congress. Although this Court recognized in *Dirks* that "there may be significant distinctions between actual legal obligations and ethical ideals," 463 U.S. at 661 n.21, in the absence of a strict and objective definition of personal benefit, few juries—faced with noncriminal activity that they may find unfair or objectionable—are likely to draw that distinction. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (the absence of clear guidelines

permits "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections") (internal quotation omitted).

The jury may infer, for example, that a *tippee's* profitable use of valuable information must have entailed a breach of fiduciary duty by the insider.[3] And courts would have no way to meaningfully police these determinations. Under the Ninth Circuit's personal-benefit test, the reviewing court has no way to determine whether the jury convicted simply to punish bad conduct or whether it actually found the *kind* of breach of fiduciary duty that is necessary to convict someone of a crime (namely, one involving a personal benefit to the insider). After all, apart from a "close" relationship, there would be no other concrete facts necessary to establish that the insider in fact derived a benefit. Given these realities, it may often be impossible to discern whether the jury concluded that the tipper actually received a benefit for the information and, if so, what kind. The risk of improper conviction is high.

This heightened risk of conviction also creates tremendous plea pressure on defendants. Potential sentences under federal securities laws are draconian. A person convicted of insider trading faces up to 20 years' imprisonment and a fine of up to $5 million. 15 U.S.C. § 78ff(a). The specter of such penalties, paired with a broad, amorphous personal-

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[3] The recent insider trading initiative in the Second Circuit prior to the *Newman* decision suggests that prosecutors recognized this jury dynamic, as downstream tippees receiving sizable trading profits were typically prosecuted more zealously than the insiders actually accused of breaching their fiduciary duties.

benefit standard, gives prosecutors extraordinary leverage. Such a legal regime would flip the burden of proof and force defendants in many instances to prove a negative to the jury, notwithstanding the absence of any *quid pro quo* or tangible gain to the tipper—namely, that the tipper obtained no emotional benefit despite his personal relationship with a tippee. Even if defendants have serious arguments that the insider received no personal benefit from the disclosures, the risk calculus, distorted by the uncertainty under such a rule, may lead many legally innocent defendants to plead guilty.

3. In this case, the Ninth Circuit erred by all but reading the personal-benefit requirement out of *Dirks*. The court seized upon *Dirks*'s "gift" language, but missed the critical point of that decision. What makes *trading* on inside information fraudulent is the insider's misuse of corporate information for personal gain. What makes *tipping* improper is the fact that federal law precludes a person from doing indirectly what he may not do directly; an insider cannot escape liability merely because he structured a transaction to allow him to reap secret profits without having to trade directly. But in either case—direct trading or a structured transaction—the improper conduct is the same: the insider collects improper gains through abuse of his corporate position. And it is that fact that brings tippees within the reach of Section 10(b).

The transactions at issue here are different. Maher (the insider) never received any tangible benefit from his brother Michael, the tippee, in exchange for the inside information. Nor was there

any indication that Maher was funneling his trades through Michael in order to reap secret profits for himself: he neither earned a windfall nor provided information on the expectation that he would receive anything in return. There was a "close fraternal relationship" between them, Pet. App. 6, but there was no gain to Maher from his brother's abuse of that relationship. If this is enough, it is difficult to imagine any reason apart from mistake or inadvertence that would not bring a tip within the reach of Section 10(b). The evidence in this case therefore cannot sustain a conviction for insider trading.

This is not to suggest that a jury would be likely to find the actors here sympathetic. But Congress has not outlawed unsympathetic conduct. *See Dirks*, 463 U.S. at 661 n. 21 ("[T]here may be *significant* distinctions between actual legal obligations and ethical ideals.") (internal quotation omitted and emphasis added). And anything short of a parity-of-information rule will inevitably allow some parties to reap profits by trading on inside information. Yet this Court has twice rejected an equal-information rule. To the extent the Government sees that limitation as a problem, it is a problem properly addressed to Congress. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 40 (1955) (a court's role is to "interpret [a statute,] not to expand and enlarge upon it").

II. THE RULE OF LENITY PROVIDES ADDITIONAL REASONS TO REJECT THE RULE ADOPTED BELOW.

For these reasons, the Ninth Circuit's decision cannot be accepted without reading the personal-

benefit requirement out of *Dirks*. But even if Section 10(b) could plausibly be read to encompass the kind of personal benefits contemplated by the Ninth Circuit, the rule of lenity would foreclose such a result. There is, at best, severe doubt about whether Congress, by outlawing fraud, intended to criminalize the conduct at issue here.

1. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.); *see McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language."). This rule serves two principal functions. It ensures that individuals receive "fair warning" before being punished for their conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971). It is foundational that "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Santos*, 553 U.S. at 514 (plurality op.); *see United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute."). The rule also "vindicates the principle that only the *legislature* may define crimes and fix punishment." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., statement respecting denial of certiorari); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (the rule of lenity "is founded on ... the plain principle that the

power of punishment is vested in the legislative, not in the judicial department"). The rule of lenity does this by precluding courts from expanding criminal prohibitions by resolving ambiguities in favor of liability.

Both concerns are implicated here. Congress has never defined, or even expressly prohibited, insider trading. Indeed, this Court itself has recognized that neither the statutory language nor even the legislative history of Section 10(b) "specifically address[es] the legality" of insider trading. *Chiarella*, 445 U.S. at 230; *see also id.* at 226 (§10(b) "does not state whether silence may constitute a manipulative or deceptive device"). Courts have therefore been left to determine what forms of trading fall within the exceedingly general prohibition on the use of deception "in connection with the purchase or sale of any security," 17 C.F.R. § 240.10b-5 (1998). *See, e.g.*, J. Kelly Strader, *(Re)conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOK. L. REV. 1419, 1422 (2015) ("insider trading is a form of securities fraud that is primarily judicially-defined"); Vollmer, *supra*, at 5-6. It breaks no new ground to note that this judge-made, ad-hoc law-making process has failed to yield uniform and clear standards, but instead, as a former chair of the SEC has noted, has produced an "intolerable degree of uncertainty" for market participants. Harvey L. Pitt & Karen L. Shapiro, *The Insider Trading Proscriptions Act of 1987: A Legislative Initiative for a Sorely Needed Clarification of the Law Against Insider Trading*, 39 Ala. L. Rev. 415, 416 (1988). As one commentator put it, "the legal restrictions on

trading securities while in possession of material nonpublic information are confused and confusing." Jill E. Fisch, *Start Making Sense: An Analysis And Proposal For Insider Trading Regulation*, 26 GA. L. REV. 179, 179 (1991); *see also* Richard M. Phillips & Larry R. Lavoie, *The SEC's Proposed Insider Trading Legislation: Insider Trading Controls, Corporate Secrecy, and Full Disclosure*, 39 ALA. L. REV 439, 440 (1988) ("[T]he case-by-case approach has failed to produce a rational, comprehensible definition that the average person can apply with predictability.").

The Ninth Circuit's decision only deepens this confusion. Rather than clarify the boundaries of the personal-benefit requirement, the court sustained liability on nothing more than vague testimony that the insider was "close" with his brother and shared information "to 'benefit' [him] and to 'fulfill whatever needs had he had.'" Pet. App. 12 (alteration omitted). What benefit did the insider receive from all of this? The Ninth Circuit did not say. Apparently, the psychological satisfaction of providing assistance to his brother was enough. *See* U.S. Supp. Br. at 8, *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015) (No. 14-10204) (arguing that "the personal benefit of appeasing and benefiting his brother" was sufficient). But, as noted, if that is enough, there is no principled way to limit liability short of a parity-of-information rule, which this Court has expressly rejected.

What remains, then, is a field of uncertainty between two poles. On one end are cases in which the insider discloses information for a tangible benefit, which would clearly support tippee liability. On the other are cases where the insider discloses

information by mistake or inadvertence, which clearly would *not* support liability But in between—if the Government's position were accepted—it is impossible to discern where liability ends. If intent to benefit a friend is enough, how is "friend" defined and how close does that friend need to be? If family receives the information, what degree of consanguinity is required? And if the mere intent to benefit family and friends is sufficient, what other psychological benefits suffice as well? These questions defy clear and certain answers. And it is precisely this situation that the rule of lenity guards against. If a law "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement," it cannot support a criminal conviction. *United States v. Williams*, 553 U.S. 285, 304 (2008). Because the Ninth Circuit adopted a rule that provides neither fair notice nor a clear standard of liability, its position must be rejected.

2. The rule of lenity should have special force in the insider-trading context, given Congress's consistent refusal to draw clear lines. In 1984, Congress passed the Insider Trading Sanctions Act of 1984, which enhanced the penalties for insider trading. Though Congress considered defining the offense of insider trading, it ultimately did not. At the hearings, the SEC warned that a legislative definition would leave holes and remove the flexibility necessary to address novel conduct. *See The Insider Trading Sanctions Act of 1983: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs,*

98th Cong., 2d Sess. 37-38 (1984) (testimony of SEC Enforcement Director John Fedders); H.R. Rep. No. 98-355, at 32-33 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 2274, 2305 (testimony of SEC Chairman John S. R. Shad). While the SEC's candor is admirable, this rationale is antithetical to rule-of-law and separation-of-power principles—namely, that proscriptions must be promulgated by the legislature, before conduct is penalized, and in a manner that affords fair warning of what is prohibited.

In 1988, Congress again considered defining the offense of insider trading on two separate occasions. The first was when the Insider Trading Proscriptions Act of 1987 was introduced. Oliver P Colvin, *A Dynamic Definition of and Prohibition Against Insider Trading*, 31 SANTA CLARA L. REV. 603, 619-20 (1991). Though the proposal would have defined the prohibition on insider trading, Congress did not enact it. *Id.* The second was when Congress considered the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988). Congress passed this act, but refused to define what insider trading is prohibited. H.R. Rep. No. 100-910, at 11 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 6043, 6048. The Court should not do the work that Congress has repeatedly declined to do.

III. THE DECISION BELOW EXEMPLIFIES A BROADER PATTERN OF OVER-CRIMINALIZATION THROUGH EXPANSIVE INTERPRETATION OF FEDERAL CRIMINAL LAWS.

The Ninth Circuit's decision fits into a larger pattern. As noted, since the inception of insider-

trading liability under Section 10(b), the government has consistently fought to transform that provision into an equal-information rule. *Supra*, at 7. While this Court has repudiated these efforts, this has not decreased the Government's appetite for interpreting Section 10(b) as broadly as possible. *See Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) (rejecting SEC's "broad" reading of "make" in Rule 10b-5); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 188-191 (1994) (rejecting SEC's position that the Rule 10b-5 cause of action should extend to aiders and abettors). This case is simply one more chapter in this story.

Such overreach is not limited to Section 10(b). In recent years, this Court has confronted—and rejected—several similarly overbroad readings of federal criminal statutes advanced by federal prosecutors and endorsed by lower courts. In *Yates v. United States*, 135 S. Ct. 1074 (2015), for example, a commercial fisherman caught undersized red grouper in violation of federal fishing regulations and "ordered a crew member to toss the suspect catch into the sea." *Id.* at 1078 (plurality op.). The defendant was brought up on criminal charges for violating 18 U.S.C. § 1519, a provision of the Sarbanes-Oxley Act that criminalizes concealing or destroying "any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. *Id.* This Court reversed, rejecting the government's "unrestrained" and "aggressive" reading of "tangible object" to include fish. "It is highly improbable," the Court observed, "that Congress would have buried a general spoliation

statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087

In *Bond v. United States*, 134 S. Ct. 2077 (2014), the defendant, upon discovering that her closest friend was pregnant with her husband's child, spread "irritating chemicals" on the friend's car door, mailbox, and door knob. *Id.* at 2085. The friend suffered a minor injury to her thumb, "which she treated by rinsing with water." *Id.* The government charged defendant with violating a provision of the Chemical Weapons Convention Implementation Act of 1998 that forbids the "possess[ion] or use ... [of] any chemical weapon." 18 U.S.C. § 229(a)(1). Noting that defendant's "common law assault" was nothing like the "war crimes and acts of terrorism" the Convention was designed to address, the Court refused to accept the government's "boundless" interpretation of the statute, which would have "ma[d]e it a federal offense to poison goldfish" with "a few drops of vinegar." 134 S. Ct. at 2090-91.

This is not to say, of course, that the defendants in these cases were morally blameless. In many cases implicating overcriminalization concerns, the defendant's conduct is objectionable. But federal law is not coextensive with upright conduct. Nor does Section 10(b) in particular exhaust the ethical standards for securities trading. *See Chiarella*, 445 U.S. at 232 ("[N]ot every instance of financial unfairness constitutes fraudulent activity under §10(b)."). But nothing in this justifies impressing federal criminal law into service that its text cannot bear. For one thing, the rule of lenity squarely precludes this approach in order to preserve the

important constitutional principles of fair notice and separation of powers. For another, states themselves have broad authority to criminalize behavior that federal law does not. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("the Founders ... reposed [the police powers] in the States"). This is true even in the insider-trading context. Both *Chiarella* and *Dirks* premised insider-trading liability under Section 10(b) on a breach of fiduciary duty. *Dirks*, 463 U.S. at 654; *Chiarella*, 445 U.S. at 232. Because fiduciary duties are largely creatures of state law, states could likely "impose a duty to reveal material, non-public information in all securities transactions." Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV 1491, 1501 n. 42 (1999). This would lay the foundation for "finding a deception whenever someone traded on such information." *Id.* States thus have latitude to decide for themselves which other forms of insider trading should be criminalized. The effect of the Ninth Circuit's expansive interpretation, however, is to federalize the issue entirely, leaving states with little room to act. *See Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting government's interpretation that would "invite[] us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

There are significant and concrete consequences that flow from such overcriminalization. Most obviously, capacious readings of criminal statutes vastly expand the power of prosecutors and law enforcement. Where a law is interpreted overly broadly, it may reach a vast swath of conduct that the legislature did not intend to proscribe and that

few would expect to fall within the scope of the law. This leaves many to the mercy of prosecutorial discretion.

This problem is exacerbated in the insider trading context, where, as noted earlier, an amorphous personal-benefit standard will effectively invite juries to convict defendants for conduct that is not criminal but strikes jurors as unethical, and will pressure defendants, in the face of that possibility, to enter unwarranted guilty pleas.

CONCLUSION

In *Dirks*, this Court highlighted the importance of "objective criteria," "limiting principle[s]," and "legal limitations" in defining the scope of liability under Section 10(b). Because the decision of the court of appeals offered none of these, its judgment should be reversed.

Respectfully submitted,

MEIR FEDER
Counsel of Record
SAMIDH GUHA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

HENRY W. ASBILL
DAVID MORRELL
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001

JEFFREY L. FISHER
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for National Association of Criminal Defense Lawyers

IRA M. FEINBERG
Co-Chair, NYCDL Amicus Committee
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

Counsel for New York Council of Defense Lawyers

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IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NYU CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

DEBORAH L. GRAMICCIONI
Executive Director
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street
New York, NY 10012
(212) 998-6612

STEPHEN L. ASCHER
ANTHONY S. BARKOW
Counsel of Record
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1600
abarkow@jenner.com

Additional Counsel Listed Inside

CAROLINE M. DECELL
DAVID B. DIESENHOUSE
LORENZO DI SILVIO
MICHAEL E. STEWART
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1600

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law ("Center") submits this brief as *amicus curiae* in support of neither party.[1] The Center is dedicated to defining good government and prosecution practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. As the Center's name suggests, it is devoted to improving the quality of the administration of criminal justice and advocating the adoption of best practices through its scholarly, litigation, and public policy components. The Center's litigation practice aims to use the Center's empirical research and experience to assist courts in addressing issues of broad importance to the administration of the criminal justice system, and it files briefs in support of both the Government and defendants in criminal matters.

Just imposition of criminal liability requires clear rules that provide fair notice to individuals and organizations of the scope of conduct proscribed by the law. Clear rules are also essential to guide the exercise of prosecutorial discretion and avoid arbitrary or

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[1] All parties have consented to the filing of this *amicus curiae* brief. Blanket consent has been provided by Petitioner Salman, and a letter of written consent from Respondent United States has been filed with the Clerk of the Court. No portion of the brief was authored by counsel for a party. No person or entity other than the Center or its counsel made a monetary contribution to the preparation or submission of this brief.

No part of this brief purports to represent the views of New York University School of Law, or New York University, if any.

inconsistent applications of criminal statutes by prosecutors and judges. *See Burrage v. United States*, 134 S. Ct. 881, 891 (2014) (noting "the need for clarity and certainty in the criminal law" and the problems inherent in leaving "lower courts . . . to guess" about proper application of standards for criminal liability); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them").

Lower courts and commentators have widely acknowledged that the rules governing insider trading currently lack such clarity, particularly in cases involving the potential liability of tippers and tippees. The Center submits this brief in support of neither party in an effort to aid the Court in clarifying the standards of liability for insider trading by tippers and tippees.

SUMMARY OF ARGUMENT

As the question presented in this case demonstrates, lower courts have long struggled to apply the "personal benefit" holding of *Dirks v. SEC*, 463 U.S. 646 (1983), in a principled manner. Lower courts have treated "personal benefit" to the tipper as if it were an "element" of the offense. *See, e.g.*, Final Jury Instructions at 41, *United States v. Salman*, No. 3:11-cr-00625-EMC (N.D. Cal. Sept. 27, 2013), ECF No. 245. But at the same time, they have had great difficulty determining in a coherent fashion whether a given benefit to the tipper is sufficiently "objective" or

"consequential," or whether a friendship between the tipper and the tippee is sufficiently close, to satisfy the element. As a result, courts have reached inconsistent outcomes based on arbitrary distinctions that have no basis in § 10(b) of the 1934 Act and that have nothing to do with securities trading or even the disclosure of information that is material to securities trading.

This continued lack of clarity deprives potential defendants of fair notice regarding the legality of their conduct, confuses fact-finders, and opens the door to arbitrary and abusive enforcement of the law. Clarity is particularly important in this context, given the speed and volume of trading in the securities markets and the extraordinary efforts that law-abiding institutions and individuals undertake to comply with the law.

The Center therefore urges the Court to adopt clearer standards of tipper-tippee liability, and ones more firmly grounded in the statutory text. Criminal liability should not turn on a fact-finder's evaluation of how friendly a tipper and tippee are, or whether a tippee's assistance to the tipper meets some arbitrary threshold of significance.

Rather than treat a personal benefit as an element of a tipper-tippee case and require the Government to prove either a concrete personal benefit to the tipper or a friendship or family relationship between the tipper and the tippee that satisfies some level of "closeness," the Court should realign the standards to focus on two issues:

First, the question of whether the tipper breached her fiduciary duty should require the Government to prove that the tipper made a disclosure of material nonpublic information for some purpose *other* than to benefit the corporation and its shareholders (in a classical case) or the source of the information (in a misappropriation case). Making a disclosure for an improper purpose should suffice to establish a breach of fiduciary duty for purposes of § 10(b). *Cady, Roberts & Co.*, 40 S.E.C. 907, 911-12 (1961); *see Dirks*, 463 U.S. at 653-54. As we explain with several examples below, although the presence or absence of a personal benefit to the tipper, including what may be inferred from the relationship of the tipper to the tippee, can be relevant to this analysis, it should not be dispositive, and thus the personal benefit holding of *Dirks* should not be treated as setting forth an element of the offense.

Second, whether the tipper knew that the tippee would trade on the disclosed nonpublic information should be treated as an element of the offense, for two independent reasons:

1. As this Court recently emphasized, disclosure "in connection with the purchase or sale of any security," a statutory requirement, is fundamental to the imposition of any liability under § 10(b). 15 U.S.C. § 78j(b); *see United States v. O'Hagan*, 521 U.S. 642, 656 (1997). Without such a showing in a tipper-tippee case, the Government may have proven a breach of the tipper's fiduciary duty or a theft of information, but has not proven a violation of the securities laws. Lower courts appear to

have lost sight of this element in searching for a "personal benefit" purportedly required by *Dirks*.

2. The tipper's knowledge (or lack thereof) that the tippee would trade is also highly relevant – far more relevant than the presence or absence of a personal benefit – to the question of whether the tipper has breached her fiduciary duty with the necessary intent to defraud. For example, if the tipper knows that the tippee intends to trade on the material nonpublic information, then the tipper almost certainly could not have made the disclosure for a proper purpose. By the same token, under some circumstances, the tipper's knowledge of the tippee's intent to trade and earn a substantial profit as a result of the tip may be evidence that the tipper has received (or at least expects to receive) a personal benefit in exchange.

Unless both of these criteria are satisfied (*i.e.*, disclosure for a purpose other than to benefit the corporation or the source of the information *and* knowledge that the tippee would trade on the information), liability should not attach under the securities laws. Below, the Center proposes standards for tipper and tippee liability that encompass these clarifications. The proposed standards are consistent with this Court's seminal insider trading cases and are more administrable and fairer than the standards currently employed by lower courts attempting to adhere to *Dirks*. They thus comport with, while improving upon, relevant precedent.

ARGUMENT

I. The Personal Benefit Element Is Standardless, Leads Fact-Finders To Focus On Facts Not Typically Associated With Criminal Liability, And Yields Inconsistent Results.

In *Dirks v. SEC*, this Court held that an alleged tipper can be held liable for insider trading only if the tipper "personally will benefit, directly or indirectly" by virtue of the tip. 463 U.S. at 662. *Dirks* foresaw that this requirement could be satisfied in a number of ways, including through direct proof of a *quid pro quo* exchange, evidence that the tipper and tippee had a relationship that would suggest the tip was given as part of a *quid pro quo* arrangement or out of an "intention to benefit" the recipient, or evidence that the tip was a "gift of confidential information to a trading relative or friend." *Id.* at 664. The personal benefit requirement was put in place to ensure that only those making disclosures in breach of a fiduciary duty would be held liable for federal insider trading violations, and, to exclude a hard case, where a disclosure was not authorized, but was made by a whistleblower who plainly did not have fraudulent intent.

Both Petitioner and Respondent urge the Court to resolve this case by further interpreting this personal benefit requirement as if it were an element of the offense. *See, e.g.*, Pet. Br. at 3, *Salman v. United States*, No. 15-628 (filed May 6, 2016). Over 30 years of experience have shown, however, that application of the personal benefit requirement requires courts regularly to determine liability based on distinctions that are untethered to the text of § 10(b) and Rule 10b-

5, that are unrelated to securities trading or information that is material to securities trading, and that sometimes border on the frivolous. Adopting either party's argument would not resolve these problems. Regardless of whether a personal benefit must be a tangible pecuniary exchange, as Petitioner contends, or can involve intangible benefits and gifts to trading friends and relatives, as argued by the United States, courts' intense focus on the personal benefit requirement produces inconsistent and unprincipled outcomes. In the face of such unpredictable results, this Court should seize the opportunity to clarify the standards for insider trading liability by refocusing the inquiry on elements that are firmly grounded in the statutory text of § 10(b) itself.[2]

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[2] Given the similar analytical framework used in criminal and civil insider trading cases, the Center's brief cites to SEC enforcement actions in addition to criminal insider trading cases. We recognize, of course, that "[t]o establish a criminal violation of Rule 10b-5, the Government must prove that a person 'willfully' violated the provision." *O'Hagan*, 521 U.S. at 665 (quoting 15 U.S.C. § 78ff(a)). Furthermore, "a defendant may not be imprisoned for violating Rule 10b-5 if he proves that he had no knowledge of the Rule." *Id.* at 666 (citing 15 U.S.C. § 78ff(a)). In enforcement actions brought by the SEC, recklessness rather than willfulness may meet the requisite level of scienter. *See, e.g.*, *SEC v. Obus*, 693 F.3d 276, 286 (2d Cir. 2012); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (declining to address whether recklessness suffices for civil liability under § 10(b) and Rule 10b-5).

A. Petitioner's Construction Of The Personal Benefit Element – That A Tangible Pecuniary Benefit Is Always Required.

Should this Court hold that a violation of the securities laws requires proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as Petitioner contends, it will still leave courts with no clear standard to apply to determine what benefit is sufficiently concrete. Although Petitioner touts his personal benefit standard as a bright-line rule, it is not. Whether a particular benefit is tangible enough to warrant insider trading liability has been answered unevenly and in seemingly irreconcilable ways by the courts.

For example, the Second Circuit has struggled to determine, with consistency, whether assistance with one's job or career is sufficient to constitute a "personal benefit," when given in exchange for material nonpublic information. That court has held that the "goodwill" generated by a tip made to curry favor with one's boss could satisfy the personal benefit requirement,[3] but that "career advice" and editorial assistance on a résumé could not[4] – even though the first case involved

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[3] *Obus*, 693 F.3d at 292; *cf. SEC v. Cuban*, 620 F.3d 551, 557 n.38 (5th Cir. 2010) (noting that it would "not be difficult for a court to infer" that a CEO made a tip to "a wealthy investor and large minority stakeholder" for the personal benefit of "goodwill").

[4] *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).

only potential aid in the future, while the second involved actual assistance already given.

Decisions construing the sufficiency of personal services in exchange for the tip have been similarly inconsistent. For example, courts have held that a tipper's provision of plumbing assistance on the tippee's septic tank made it "highly plausible" that the tipper and tippee had "the type of relationship where there was, at a minimum, a give and take of sorts that had the *potential* for pecuniary gain,"[5] but that a paying customer's disclosure of inside information to his barber of 15 years failed to establish a *quid pro quo* arrangement.[6] What makes these cases even more incongruous is that in the septic tank case the plumbing assistance and the tip were both given by the tipper, while in the hair-cutting case the tip was arguably a *quid pro quo* for the years of good service, as the customer gave the tip to his barber.

These distinctions cannot be reconciled, and their ability to measure the wrongfulness of a disclosure is unclear at best. Importantly, they also find no basis in the text of § 10(b) as a means for determining insider trading liability. The purported bright-line rule suggested by the Petitioner would only leave courts,

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[5] *SEC v. Andrade*, No. cv-15-231, __ F. Supp. 3d __, 2016 WL 199423, at *4 (D.R.I. Jan. 15, 2016) (internal quotation marks omitted).

[6] *SEC v. Maxwell*, 341 F. Supp. 2d 941, 943-44 (S.D. Ohio 2004).

prosecutors, and traders uncertain about the line between innocence and guilt.

B. Respondent's Construction Of The Personal Benefit Element – That Gifts To Friends And Family Constitute A Personal Benefit.

Alternatively, the United States contends that a gift of information made to a "trading relative or friend" is a sufficient benefit to establish insider trading liability, and in those circumstances proof of a tangible personal benefit is not required. *See* Br. for the United States in Opp'n at 13, *Salman v. United States*, No. 15-628 (filed Dec. 14, 2015). That test, in particular, invites courts to engage in arbitrary, idiosyncratic, and even frivolous inquiries into the personal ties between tipper and tippee to determine whether they are "close enough" to infer a relationship that is tantamount to a personal benefit to the tipper.

Cases involving the relationship between a service provider and a customer have typified these problems. For example, although the 15-year barber-customer relationship mentioned above was held to be insufficient to permit the inference of a personal benefit, a dentist-patient relationship was held to be sufficient because the dentist and tipper patient were "friendly," the tipper had previously referred business to the dentist, and the tip was "an effort to effect a reconciliation with his friend and to maintain a useful networking contact."[7] Notably, the court in the barber

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[7] *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000).

case found no "personal benefit" partly because the parties' "relative stations in life" made it unlikely that the tipper would gain a useful reputational benefit, and because, in the court's view, the considerable "magnitude" of the barber's gains – nearly $200,000 – somehow made it *less* likely that the tipper intended to provide him a gift.[8]

Cases involving friendships have proven equally problematic and also have turned on distinctions untethered to the securities laws. In one case the court held that "the undisputed fact that [tipper] and [tippee] were friends from college is sufficient to send to the jury the question whether [tipper] received a benefit,"[9] and in another, the court relied on evidence that the tipper and tippee "ate dinner, drank beers, played video games, watched TV, used drugs, and discussed their respective days, current events, and personal details of their lives."[10] In contrast, another court found no personal benefit to a tipper who was a former work colleague but not, in the court's estimation, a "friend" of the tippee, a determination based in part on evidence that the tippee was a golfer and heavy drinker and the tippee was "neither a golfer nor a drinker."[11]

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[8] *Maxwell*, 341 F. Supp. 2d at 943-44, 948-49.

[9] *Obus*, 693 F.3d at 291.

[10] *SEC v. Payton*, No. 14-cv-4644, __ F. Supp. 3d __, 2015 WL 9463182, at *4 (S.D.N.Y. Dec. 28, 2015).

[11] *SEC v. Anton*, No. 06-2274, 2009 WL 1109324, at *1 n.3, *9 (E.D. Pa. Apr. 23, 2009).

The distinctions in these cases are not just illogical and unrelated to traditional bases for criminal or regulatory punishment; they are entirely disconnected from the text of § 10(b) or Rule 10b-5. Similar questions about whether the nature of a relationship permits the inference of a personal benefit arise regularly, and their results are often difficult to explain by any uniform, objective, or statutory criteria.

Although cases involving tips to family members have proven less likely to produce inconsistent outcomes, one can easily imagine circumstances requiring a court to grapple with the question of whether a family relationship was sufficiently close to permit an inference of a personal benefit. A cousin's in-laws? An adopted child's birth mother? The *Dirks* Court's emphasis on familial relationships also assumes, counterfactually, that familial relationships are necessarily closer than other forms of relationships. But again, it is not hard to imagine situations where a tipper's relations with a family member could be more distant or unfriendly than relations with a casual acquaintance, say, his barber.

In sum, both the tangible personal benefit test advocated by Petitioner and the carve-out for friends and family advocated by the United States would require courts to find facts that are unrelated to the securities laws, and require value-laden judgments as to the threshold between "friendship" or relationships of mutual advantage and more detached societal relationships. Those judgments can differ from judge to judge and juror to juror, inviting inconsistent

outcomes in criminal, as well as SEC enforcement, cases. Neither standard should be adopted.

II. The Government Should Be Required To Prove Instead That The Disclosure Was Not For A Corporate Purpose, And That The Tipper Knew A Tippee Intended To Trade.

In light of the confusion and arbitrariness that would be continued by adopting either of the competing personal benefit tests before the Court, the Center proposes standards for tipper and tippee liability that provide greater predictability and fairness and are firmly grounded in the text of the statute, while still hewing to this Court's insider trading precedents.

Specifically, the Center proposes the following standards for tipper and tippee liability, respectively: A tipper is liable for insider trading upon proof of (1) a disclosure (2) of material nonpublic information (3) in breach of a duty, meaning an unauthorized disclosure that does not serve the purposes of the company (under the classical theory) or the source of the information (under the misappropriation theory) (4) in connection with a trade, meaning that the tipper knows that the trader will purchase or sell securities while in possession of the material nonpublic information (5) in willful violation of the securities laws. Likewise, a tippee is liable for using rather than disclosing[12]

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[12] *See O'Hagan*, 521 U.S. at 656 (explaining that proof of insider trading requires a showing that a defendant traded "on the basis of material, nonpublic information"); *United States v. Anderson*, 533 F.3d 623, 630 (8th Cir. 2008) ("This requires that the defendant did

material nonpublic information under these circumstances.

These proposed standards offer two important revisions to those currently employed by lower courts in insider trading tipper-tippee cases, and to the standards advocated by the Petitioner and the United States here:

First, to satisfy the third element under the Center's proposed standards (a breach of duty), the Government must show that the tipper made an unauthorized disclosure of inside information to serve the interests of *anyone* other than the corporation's shareholders (under a classical theory) or the source of the information (under a misappropriation theory); the Government would not have to prove a personal benefit to the tipper in exchange for that information (whether a tangible personal benefit directly to the tipper, or an indirect personal benefit as a result of a tip to a friend or family member).

Second, to satisfy the fourth element ("in connection with a purchase or sale of securities") with respect to a tipper or an intermediary tippee, the Government would have to prove that the tipper or intermediary tippee knew that the ultimate tippee would trade while in possession of the improperly disclosed information, underscoring one of the core elements of a securities

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not just possess the information but actually used the information."); *United States v. Smith*, 155 F.3d 1051, 1069-70 & n.28 (9th Cir. 1998).

fraud violation under § 10(b) and Rule 10b-5 – the connection to a trade.

As explained below, these two proposed revisions are more administrable and less arbitrary than the current standards lower courts have applied, and comport with this Court's case law – indeed, they restore aspects of this Court's teachings that seem to have fallen by the wayside in lower court analyses. Further, they better serve the goals of the insider trading laws as articulated by Congress and this Court.

A. The Proposed Standards Are More Administrable And Will Produce More Just Outcomes.

By focusing on the tipper's purpose in making the disclosure and her knowledge of the tippee's intention to trade, rather than the benefit received by the tipper or her relationship to the tippee, the standards suggested by the Center are more administrable for courts and juries than the personal benefit test, and they will produce more just outcomes than the current tests for liability.

Most important, instead of considering normally innocuous facts concerning the nature, duration, and intensity of the tipper and the tippee's social interactions, fact-finders will focus more specifically on the disclosure itself, including whether it was authorized by the principal and whether it was made to aid a third party's trading activity. These inquiries are grounded in the securities laws and reflect a proper and traditional focus of criminal or regulatory liability.

This salutary effect of the Center's proposed standards is demonstrated by considering its application to the Ninth Circuit's *Salman* decision, currently under review, and the Second Circuit's contrary decision in *Newman*. Under the Center's proposed standards, the liability of Maher Kara, the tipper in *Salman*, would turn on whether Kara knew that his brother would trade on that information and benefit thereby, not on the nature of their personal relationship. By the same token, the remote tippee defendants in *Newman* would not be liable if the tipper disclosed the information with his employer's authorization, as the Second Circuit suggested was the case, *see* 773 F.3d at 454-55, or if "the Government presented absolutely no testimony or any other evidence that [defendants] knew that they were trading on information obtained from insiders," *id.* at 453.

In addition to refocusing the analysis on facts concerning the disclosure and the trading, the Center's proposed standards recognize that the absence of a legitimate purpose for the disclosure, even without proof of a personal benefit, could be sufficient to establish that the disclosure was in breach of the tipper's fiduciary duty. *Cf. SEC v. Maio*, 51 F.3d 622, 632-33 (7th Cir. 1995) (noting that, "[a]bsent some legitimate reason for [the tipper's] disclosure, . . . the inference that [it] was an improper gift of confidential corporate information is unassailable," given that the tipper "did not have to make any disclosure" in the first place).

For instance, if a tipper makes an extraordinarily valuable disclosure to a tippee, but they have only a remote relationship and no money changes hands, under current law (including the standards suggested by both the Petitioner and the United States), neither party would be liable. Under the Center's proposed standards, however, a fact-finder could appropriately find that if the tipper breached her duty and provided the tippee with information, and the tipper knew that the tippee would make a large profit by trading on that information, the disclosure was for an improper purpose, and should be punished under the securities laws.[13]

As another example, under the Center's proposed standards, if the tipper makes a spiteful disclosure of confidential information to a trading acquaintance, to injure the company but without benefit to the tipper, that would also constitute an insider trading violation. By requiring proof of a personal benefit, however, the standards proposed by the Petitioner and the United States leave the possibility of liability for such a

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[13] For instance, a retiring executive, on her last day, stops a mailroom employee with whom she has never previously spoken. She advises him to dump any stock he has in the company, which, she says, is about to announce substantial losses. That executive would have no reasonable expectation of receiving a personal benefit in exchange for a tip to a stranger. Her conduct would thus go unpunished under the personal benefit test, despite being contrary to the goals of the securities laws. By contrast, under the Center's proposed standards, the disclosure qualifies as a breach, supporting liability for any trade made with the benefit of the disclosed information.

malicious disclosure uncertain, even though it is worthy of punishment under the securities laws as a betrayal of the corporation's or source's confidences to aid trading by another. *See United States v. Riley*, 90 F. Supp. 3d 176, 191 n.12 (S.D.N.Y. 2015) (noting that a malicious disclosure would "likely" be sufficient to establish a breach of fiduciary duty under insider trading laws, but citing no authority to support that proposition), *aff'd*, No. 15-1541-cr, __ F. App'x __, 2016 WL 158646 (2d Cir. Jan. 14, 2016).

Conversely, these proposed standards leave open the possibility that a tipper who receives a personal benefit in exchange for material nonpublic information, but does not know that the tipper intends to trade, would not be liable for insider trading. *Cf. O'Hagan*, 521 U.S. at 656 ("Should a misappropriator put [confidential] information to other use, the statute's prohibition would not be implicated."). For example, imagine a reporter provides a corporate insider with money, professional introductions, dinners, or other things of value in exchange for leads consisting of material nonpublic information. The insider believes that the reporter will not trade on these leads but instead may use them to investigate issues for reporting to the public via his column. On one occasion, however, the reporter trades on the information. Under current law, the insider would have breached his fiduciary duty to the corporation by disclosing the information for his own benefit, rather than that of the corporation, and would be liable notwithstanding his genuine and perhaps reasonable belief that the tippee reporter would not trade on the information. Under

the Center's proposed standards, however, the insider properly would not be liable for insider trading because he had no knowledge that the reporter would trade on the information, such that his disclosures lacked a connection to a trade, a key element for insider trading offenses. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010) ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" (citation omitted)).

That said, even under the Center's proposed standards, evidence of personal benefit or the relationship between the tipper and the tippee would not be categorically irrelevant. As *Dirks* made clear, evidence that the tip was made in exchange for a "pecuniary gain or a reputational benefit" or to a family member or friend could offer the necessary proof that the disclosure was unauthorized and made to benefit the tippee or tipper rather than shareholders or the source of the information. *See* 463 U.S. at 663-64. The Center's proposed standards would not alter the outcome in such cases where the breach was established through evidence that the tipper disclosed inside information as part of a *quid pro quo* arrangement or to benefit someone with whom the tipper had an established personal relationship. The point is that, under the Center's standards, liability will be more likely to turn on evidence that is directly tethered to the disclosure itself and to proving that it was made in violation of the tipper's fiduciary duty, *i.e.*,

for any other than a corporate purpose, rather than evidence concerning personal relationships.

B. The Proposed Standards Are Consistent With This Court's Insider Trading Decisions.

Although the Center's proposed standards differ from lower courts' application of *Dirks* and from the standards suggested by the Petitioner and the United States, they are consistent with, and in fact derived from, the seminal insider trading decisions of this Court.

Breach of Duty. First, the Center's proposed standard for determining a breach of duty derives from *Dirks*, where the Court embraced the SEC's seminal decision on insider trading, *In re Cady, Roberts & Co.* There, the SEC explained that the duty to disclose or abstain from trading on material nonpublic information derives from a "relationship giving access, directly or indirectly, to information intended to be available *only for a corporate purpose* and not for the personal benefit *of anyone*." *Cady, Roberts*, 40 S.E.C. at 912 (emphasis added), *quoted in Dirks*, 463 U.S. at 654. *Cady, Roberts* thus reaffirmed the black letter principle that a fiduciary breaches a duty to her principal by disclosing confidential information for the purposes of anyone other than the principal. *See, e.g., Zastrow v. Journal Commc'ns, Inc.*, 718 N.W.2d 51, 60-62 (Wis. 2006) (noting that a fiduciary breaches her duty of loyalty by, "e.g., . . . disclosing the beneficiary's confidential information"); *Gracey v. Eaker*, 837 So. 2d 348, 353-54 (Fla. 2002) ("Florida courts have previously recognized a cause of action for breach of fiduciary duty in

different contexts when a fiduciary has allegedly disclosed confidential information to a third party.").[14]

Thus, *Cady, Roberts* did not focus exclusively on the presence or absence of a personal benefit; the SEC also looked at the other side of the coin, whether the disclosure was made for a corporate purpose. The Center's proposed standards merely suggest this same refinement.

To be sure, at one point the Court in *Dirks* looked only at the personal benefit side of the coin, suggesting that the "test" for a breach "is whether the insider personally will benefit, directly or indirectly, from his disclosure," and that "[a]bsent some personal gain, there has been no breach to stockholders." *Dirks*, 463 U.S. at 662. That statement referred back, however, to a footnote in *Cady, Roberts* stating merely that one "significant purpose" of the securities laws "was to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office." *Cady, Roberts*, 40 S.E.C. at 912 n.15. It did not stand for the proposition that a tipper breaches her fiduciary duty only where she derives a personal benefit from the disclosure of inside information. And reading the language of *Cady, Roberts* as a whole, it was clear that the SEC was suggesting a test that included a holistic evaluation of

---

[14] *See also* Restatement (Third) of Agency § 8.05 (2006) ("An agent has a duty . . . not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.").

the tipper's purpose, including a determination of whether the tip served a corporate purpose, and was not focused narrowly on the question of whether the tipper received a personal benefit. *See Dirks*, 463 U.S. at 662 ("Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure.").

The standard proposed by the Center is coextensive with the fiduciary duty test articulated in *Cady, Roberts*. A corporate insider breaches that duty by using or sharing inside information for the purpose of benefitting *anyone* other than the corporation's shareholders – not just herself. Similarly, if a corporate outsider owes "a duty of loyalty and confidentiality" to a source of inside information, the outsider breaches that duty by depriving the source "of the exclusive use of that information." *O'Hagan*, 521 U.S. at 652.

This suggested modification would not overturn *Dirks* and expose whistleblowers to insider trading liability. As the *Dirks* Court noted, "the facts of [that] case clearly indicate[] the tippers were motivated by a desire to expose the fraud." 463 U.S. at 666-67. When Secrist told Dirks of the fraudulent conduct, he "urged Dirks to verify the fraud and disclose it publicly." *Id.* at 649. In addition, Secrist and other employees brought that information to the attention of various regulators. *Id.*; *id.* at 668 n.2 (Blackmun, J., dissenting). In short, Secrist and other insiders attempted to disseminate the information to the public in an effort to expose corporate wrongdoing, arguably honoring their fiduciary duty to the corporation and its shareholders.

The Tippee's Intent to Trade. The Center's proposal that the Government be required to prove that the tipper knew that the tippee would trade on the information is also firmly grounded in this Court's precedent. One of the core elements of securities fraud is that the violation be "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5; *see Morrison*, 561 U.S. at 266.

Lower courts have often lost sight of this predicate for securities fraud liability in searching for a personal benefit as supposedly required by *Dirks*. *See, e.g.*, *Obus*, 693 F.3d at 289 (listing elements without reference to any connection to a trade). Yet as the Court emphasized in *O'Hagan*, "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities." 521 U.S. at 656; *see id.* at 656-59. Just as misappropriation of confidential information does not amount to securities fraud unless and until the misappropriator trades on that information, a tipper of inside information should not be liable for securities fraud unless she knew that a tippee would trade on that information and until a tippee actually makes the trade. Absent knowledge that the tipped information would be used for a trade, a wrongful tip should be policed not by the securities laws, but instead by the law of trade secrets, by means specified in bargained-for employment contracts, or by common law. *See id.* at 655 (noting that disclosure of a misappropriation of information negates the deception required for securities liability, but that "the fiduciary-turned-

trader may remain liable under state law for breach of a duty of loyalty").

The tipper's knowledge of the tippee's intent to trade is also crucial to proving fraudulent intent, as such knowledge supports an inference, at the very least, that the tipper disclosed the information with an intent to benefit the tippee and not the corporation. Conversely, the Government's inability to prove such knowledge supports an inference that the tipper did not have fraudulent intent within the meaning of the securities laws, and committed, at most, a common law breach of fiduciary duty. *Cf. Obus*, 693 F.3d at 287 (explaining that there would be "a valid defense to scienter if the tipper [could] show that he believed in good faith that the information disclosed to the tippee would not be used for trading purposes").

CONCLUSION

For the foregoing reasons, the Center respectfully urges the Court to articulate a clearer standard for tipper-tippee insider trading liability along the lines set forth above.

Respectfully submitted,

DEBORAH L. GRAMICCIONI
Executive Director
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street
New York, NY 10012
(212) 998-6612

STEPHEN L. ASCHER
ANTHONY S. BARKOW
Counsel of Record
CAROLINE M. DECELL
DAVID B. DIESENHOUSE
LORENZO DI SILVIO
MICHAEL E. STEWART
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1600
abarkow@jenner.com

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

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IN THE
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BASSAM YACOUB SALMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF OF OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

AKSHAT TEWARY
Counsel for Amicus Curiae
1974 State Route 27
Edison, NJ 08817
(732) 287-0080
info@tewary.com

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STATEMENT OF INTEREST[1]

Occupy the SEC ("OSEC") is a nonprofit charity with roots in the New York-based Occupy Wall Street movement. OSEC's mission is to advocate for specific improvements to legislation and regulations governing the financial services industry. We seek to ensure that the nation's laws serve the public interest, and not that of Wall Street and its lobbyists. Our group has previously filed amicus curiae briefs in court cases that raise significant issues of concern for financial activists, including the recent Supreme Court cases *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) and *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

OSEC submits this brief in support of Respondent and the holding of the Ninth Circuit in the case below, *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015). The instant case centers on a key safeguard against fraudulent insider trading practices: tipper-tippee liability under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j (2006).

Insider trading plagues the securities market today, just as it did a century ago when Justice Brandeis observed that insider positions had become "a happy hunting round for" investment bankers. Louis Brandeis, *Other People's Money and How the Bankers Use It* 13 (1914). "The goose that lays golden eggs has

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[1] The parties have consented to the filing of this brief. The Petitioner has filed a blanket consent to the filing of amicus briefs. A letter from Respondent's counsel consenting to the submission of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by somebody else's goose. The investment bankers and their associates now enjoy that privilege." *Id.* at 12.

The exploitation of confidential issuer information by insiders and their tippees continues to plague the securities markets to this day. Empirical evidence reveals that, in the last thirty years, a quarter of mergers and acquisitions involving public companies have suffered from insider trading. Patrick Augustin, M. Brenner, et al., Informed Options Trading Prior to M&A Announcements: Insider Trading? 2 (May 2014), http://bit.ly/2aOnoN1. And forty-five percent of the price increase associated with a merger or takeover occurs before the transaction's announcement to lay investors in the public. William L. Cary & Melvin Eisenberg, *Business Organizations* 944 (11th ed. 2014). The securities markets are rigged in favor of the well-connected and the influential.

This case involves an important legal standard that, if interpreted wrongly, could handcuff the government in its ability to root out such market inequities. OSEC files this amicus to advocate for the interests of lay investors and members of the public at large, whose access to justice will be severely limited if the Court adopts the Petitioner's position. Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by interpreting Section 10(b) of the Exchange Act in a manner that

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[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration/.

reaffirms that a gift of confidential information from a company insider to a tippee can qualify as a breach of the insider's fiduciary duty to the company. Such an interpretation will protect investors and vindicate the Exchange Act, a central purpose of which was "to insure the maintenance of *fair* and honest markets." 15 U.S.C. § 78b (emphasis added).

SUMMARY OF ARGUMENT

In *Dirks v. SEC*, 463 U.S. 646 (1983), the Court defined tipper-tippee liability, an important aspect of Section 10(b)'s prohibitions on insider trading. Under *Dirks*, a corporate insider at a security issuer breaches his fiduciary duty to the company when he tips a non-insider tippee with confidential company information for trading purposes. *Id.* at 661. In order for the tippee to be liable for trading on the nonpublic information, the insider must have given the information to the tippee for the insider's own "personal benefit." *Id.* at 662.

Dirks established a two-part test to determine when the insider has breached his fiduciary duty by tipping information: a) when the tip is in exchange for some monetary value ("*quid pro quo*"), or b) when the tip is a gift to a trading relative or friend. *Id.* at 664. In *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015), the Second Circuit essentially ignored the second part of the test, and held that only a pecuniary exchange, or a *quid pro quo*, would qualify under the *Dirks* personal benefit test.

That reasoning fallaciously ignored the clear mandate in *Dirks* that an improper purpose is a sufficient basis

for a fiduciary breach. *See Dirks*, 463 U.S. at 659. An insider personally benefits from a tip when he exploits secret company information to enrich himself ***or*** someone of his choosing. *See id.*

Various interpretative principles militate in favor of reaffirming this holding in *Dirks*, without modification. For instance, the *Dirks* standard for tipper liability is not unconstitutionally vague and finds ample support in the breadth of Section 10(b). Also, the Court should reaffirm *Dirks* under *stare decisis.* The Petitioner claims that the rule of lenity supports *Newman*'s constrained view of the personal benefit test. *See* Pet Br. 36, 37. However, lenity does not apply because the Exchange Act was passed with the intention of broadly prohibiting insider trading. Congress has consistently reiterated that intention over the years.

The Petitioner, like *Newman* before him, expresses special solicitude for the selective disclosure of nonpublic information to Wall Street analysts. *See* Pet. Br. 27. He argues that expansive insider trading liability under Section 10(b) hampers the free flow of information. *See id.* at 27, 52. However, his attempts to thusly constrain tipping liability must be rejected because the selective tipping of secret company information flouts congressional intent, hurts the securities markets, and undermines investor confidence.

ARGUMENT

I. THE QUESTION BEFORE THIS COURT HAS BEEN SQUARELY ADDRESSED BY *DIRKS*

A. *Dirks* Endorsed Gift Liability As Part Of Its Two-Part "Personal Benefit" Test

The issue before the Court has already been squarely and forcefully addressed in *Dirks v. SEC*, 463 U.S. 646 (1983). The Court's decision here could begin and end with a parsing of the language of *Dirks* and that case's posture towards gift liability.

In *Dirks*, the court established the circumstances under which a non-insider recipient of confidential company information ("tippee") could be liable for insider trading in violation of Section 10(b). One element[3] in tippee liability is whether the tippee has breached a duty to abstain from trading on nonpublic information. *Id.* at 659-60. Since the tippee's duty

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[3] Another element in establishing tippee liability is showing that the tippee had knowledge ("scienter") that the information was given to him in breach of the insider's fiduciary duty. *Dirks*, 463 U.S. at 660. However, this case is not about scienter, and the Court should reject the attempts of the Petitioner to interpose that separate issue into the body of this case. *See* Pet. Br. 48-52. The Court must "refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair v. United States*, 250 U.S. 273, 279 (1919); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari.") (citation omitted).

derives from that of the tipper, *id.* at 659, the question of whether a tippee has breached his duty actually turns on whether the insider's tip constituted a breach of the *insider's* fiduciary duty to the company. *Id.* at 661. An insider breaches his fiduciary where he "personally will benefit, directly *or indirectly*, from his disclosure." *Id.* at 662 (emphasis added).

The Second Circuit in *United States v. Newman,* 773 F.3d 438 (2d Cir. 2014), *cert. denied,* 136 S. Ct. 242 (2015) contended that the personal benefit test requires proof of a pecuniary interest. *Id.* at 452 (holding that "in order to form the basis for a fraudulent breach, the personal benefit received in exchange for confidential information must be of some consequence."). However, that contention is belied by the plain words of *Dirks*: "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a *gift* of confidential information to a trading relative or friend." *Id.* at 664 (emphasis added). *Dirks* used the word "gift" no less than three times in stating its holding. *Id.* at 664, 667. A gift is by definition non-pecuniary in nature. *See Oxford Dictionary of English* 737 (3d ed. 2010) (defining "gift" as "a thing given willingly to someone without payment").

Dirks clarified that a court may infer that an insider has breached his fiduciary duty from objective evidence showing:

> a) a pecuniary "*quid pro quo*" for the tip, or
> b) an intention by the insider to benefit his tippee.
>
> *Id.* at 664.

That is, personal benefit may be shown through either pecuniary or non-pecuniary evidence.

Dirks provides a useful analogy that further elucidates why a non-pecuniary gift by a tipping insider would still qualify as a breach of his fiduciary duty: it would "resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* at 664. Had the insider traded himself, he clearly would have "violated his *Cady, Roberts* duty." *Id.* at 663 (referencing *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), which formulates basic insider liability). Whether or not the tippee decided to recompense the insider with a "return gift" as a *quid pro quo* is irrelevant because the insider's breach would have already occurred even before that decision were made.

The Second Circuit in *Newman* lost sight of this crucial aspect of *Dirks*' two-part personal benefit test. By suggesting that the personal benefit test requires an exchange "of some [pecuniary] consequence," 773 F.3d at 452, the Second Circuit erroneously effaced gift liability from the personal benefit formula.

B. Under *Dirks*, An Insider Violates The Personal Benefit Test By Using Secret Company Information to Enrich Himself or His Designee

The gravamen on the personal benefit requirement is that an insider may not exploit secret company information to enrich himself or someone of his choosing. *Dirks*, 463 U.S. at 659 ("Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an

outsider for the same improper purpose of exploiting the information for their personal gain."). It makes no difference whether the purpose of the insider's breaching tip is to enrich himself or his designee. Either way, the improper disclosure is being done at the insider's direction and not at that of the company. An insider breaches his fiduciary duty when he exploits insider information for his own reasons (i.e., personal benefit), without the consent of the company.

By reading the personal benefit requirement through this lens, courts need not concern themselves with the nature of the relationship between the tipper and the tippee.[4] Likewise, they need not plumb the depths of the insider's psyche to scour for some "psychic benefit." *See* Pet. Br. 41, 57. Nor need they identify the quantum of benefit actually received by the insider, whether real or ethereal. So long as "objective facts and circumstances" evince that the insider tipped for the purpose of enriching himself or his designee, the inquiry is complete and the inference of fiduciary breach can be made. *See id.* at 664.

This reading of *Dirks* addresses all of the hypothetical challenges raised by Petitioner. For example, the Petitioner notes that Secrist (the insider in *Dirks*) probably obtained some personal satisfaction from exposing the underlying fraud that led to his tips to Dirks (the tippee). Pet. Br. 42. The Petitioner suggests that under the Ninth Circuit's reading of *Dirks*, a reviewing court could have deemed Secrist's personal

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[4] Although a close relationship between the tipper and the tippee could serve as probative objective evidence of the tipper's purposeful exploitation of secret information, it is proof of that improper purpose and not the nature of the relationship *per se* that dictates whether a fiduciary breach has occurred.

satisfaction to meet the personal benefit test for tipping liability. *See id.* However, this reasoning neglects the fact that *Dirks* cabined gift liability to those cases where the *purpose* of the insider's offending tip was to enrich himself or someone of his choosing. *See* 463 U.S. at 659. The objective evidence surveyed by the *Dirks* court revealed that Secrist's tips were not for enrichment but for a different purpose: to expose fraud. *Id.* at 667 ("As the facts of this case clearly indicate, the tippers were motivated by a desire to expose the fraud."). Similarly, accidental tipping would not qualify under a correct reading of the personal benefit test because a truly accidental disclosure would not occur for the purpose of enriching the tipper or his tippee.

The Petitioner requests that the Court afford special consideration to remote tippees as opposed to initial tippees. Pet. Br. 59 ("Section 10(b) should not be applied to remote tippees who do not directly participate in the insider's breach of duty or substantially assist a tippee who does.") However, the number of links in a tipping chain is irrelevant to the issue before the Court: whether an insider's act of tipping equates to a breach of fiduciary duty. It should be noted that other elements of Section 10(b) liability (such as scienter or materiality) may come to the aid of truly remote tippees. *See id.* at 663 n.23 ("Scienter . . . is an independent element of a Rule 10b-5 violation."). Still, those issues are ancillary to the discrete issue being decided here.

C. The Second Circuit's Limitation of the Personal Benefit Standard to Pecuniary Interests Contradicts *Dirks*

The Second Circuit's arbitrary limitation of the personal benefit standard to monetary *quid pro quo* exchanges not only flouts *Dirks,* but also leads to absurd results.

Let us suppose that Maher Kara, the insider in this case, had sold the offending tips to his brother, Michael Kara, in exchange for the pecuniary benefit of $1 million.[5] Presumably both the Petitioner and the Respondent would agree that such an exchange would violate Maher's *Cady, Roberts* fiduciary duty, and would qualify as a pecuniary "personal benefit." Now let us suppose that Maher had exchanged the tips for a derivatives contract that was initially valued at $1 million but ultimately proved to be worthless due to unfavorable market movements. Would the mere fact that Maher ultimately realized no pecuniary benefit absolve him of having breached his fiduciary duty? Under *Newman,* Maher arguably gained nothing "of consequence" and therefore breached no fiduciary duty. Yet common sense dictates that insider trading prohibitions should apply to both profitable *and* unprofitable frauds because the underlying moral culpability is the same under either scenario. *Newman*'s pecuniary "of consequence" test is flawed because it leads to this sort of disparate and illogical result.

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[5] Of course, in actuality there is no dispute that Maher provided the tips for no money. Pet. Br. 5; Resp. Br. 9-10.

This Court recently rejected similarly absurd reasoning in *Bank of America, NA v. Caulkett*, 135 S. Ct. 1995, 2001 (2015). In that case, the petitioner argued that a debtor in Chapter 7 bankruptcy could "strip off" a junior lien if it corresponded to $1 in value, but could not do so if the correspondence was to no value. *Id.* The Court rejected this "odd" reasoning and held that the drawing of such arbitrary lines may be appropriate for Congress, but is not so for the Court. *Id.*

These examples reveal the trouble with attempting to base an insider's fiduciary breach on the quantification of the personal benefit he receives. The virtue of *Dirks*' reasoning was that it deemed an improper purpose to be a sufficient basis for a fiduciary breach. 463 U.S. at 659 ("Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider for the *same improper purpose* of exploiting the information for their personal gain.) (emphasis added). To assess whether a fiduciary breach has occurred, a court need only consider the objective evidence pointing to the purpose behind the insider's disclosure, and need not appraise the value of exchange.

The question of whether a gift-giver receives any reciprocal value has plagued philosophers for centuries. *See, e.g.*, Marcel Mauss, *The Gift* 65 (1950) ("Indeed, even in our present legal systems, as in Roman law, here it is not possible to circumvent the most ancient rules of law: there must be a thing or service for there to be a gift, and the thing or service must place [the gift-giver] under an obligation"); *see also* Ayn Rand, *The Virtue of Selfishness* (1964) (arguing that charita-

ble gifts reflect a selfish benefit). *Dirks* wisely instructed courts to eschew these esoteric philosophical questions, and instead focus on objective proof of the purpose of the disclosure. 463 U.S. at 663 ("In determining whether the insider's purpose in making a particular disclosure is fraudulent, the SEC and the courts are not required to read the parties' minds.").

II. VARIOUS INTERPRETIVE PRINCIPLES STAND IN THE WAY OF PETITIONER'S REQUESTED REMEMDY

The Petitioner and his *amici* posit that various principles of interpretation militate against a broad reading of the personal benefit test. *See, e.g.*, Pet. Br. 35-44; National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers *Amicus* Br. 14-17. However, those principles do not apply.

A. The Personal Benefit Test Established By *Dirks* is Not Unconstitutionally Vague

Contrary to the Petitioner's assertions, tipping is not a "judge-made" crime. *See* Pet. Br. 60. The tipping crime is actually well-supported by Section 10(b), a catch-all provision that utilizes expansive language to prohibit all types of securities fraud:

> It shall be unlawful for ***any*** person, directly ***or indirectly***, by the use of ***any*** means or instrumentality of interstate commerce or of the mails, or of ***any*** facility of ***any*** national securities exchange—

> (b) To use or employ, in connection with the purchase or sale of ***any*** security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement ***any*** manipulative or deceptive device ***or*** contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary ***or*** appropriate in the public interest ***or*** for the protection of investors.
>
> 15 U.S.C. § 78j (emphases added).

Another provision, 15 U.S.C. § 78t(b), redoubles the force of Section 10(b)'s fraud prohibition by making it unlawful to do indirectly "by means of any other person" any act that is unlawful under the federal securities laws. *See also Dirks*, 463 U.S. at 659 (citing § 78t(b) in support of tipping liability).

The separation of powers principles cited by the Petitioner actually vindicate the *Dirks* court's (and this Court's) authority to delineate the contours of tipping liability within the rubric of Section 10(b) fraud. The Petitioner's approach would unduly hamstring the judiciary's fundamental authority "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases must, of necessity, expound and interpret that rule."). The *Dirks* court previously said what tipping liability is and it was well within its constitutional authority to do so.

The Petitioner does protest too much about the vagueness of the personal benefit element. The alternative *Newman* standard that the Petitioner champions actually exacerbates any extant vagueness in the tipping regime. Whereas *Dirks* premised tippee liability on the single issue of whether there was an improper purpose behind the tip, 463 U.S. at 659, *Newman* encumbers the inquiry with a host of new elements. Prosecutors need to prove that the exchange is "objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable." *Newman*, 773 F.3d at 452. What is "objective?" What is "consequential?" Does "similarly valuable" mean something that is non-pecuniary? These vague, overbroad terms are neither supported by prior case-law nor contained within the body of Section 10(b). If the Court adopts the *Newman* standard, the judiciary will be forced to wrangle with these vague terms for years to come.

B. *Stare Decisis* Prevents The Dismantling Of Insider Trading Law

The Petitioner's yen for judicial activism goes well beyond supplanting *Dirks* for *Newman*. He even takes the extreme position of advocating for the wholesale dismantling of insider trading law. Pet. Br. 22 ("If the Court were inclined to reconsider its prior cases, it could readily hold, based on the plain language of the statute, that §10(b) does not prohibit insider trading at all"). In one fell swoop, the Petitioner would dismiss decades of case-law shaping criminal liability for insider trading under Section 10(b), and upend the settled expectations of legislators, regulators, market

participants and the public that insider trading will be punished.

Principles of *stare decisis* prohibit such rash action. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*."); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation.") Any departure from prior precedent requires special justification. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

The Petitioner has not provided sufficient justification for decriminalizing insider trading. He presents various theories[6] about why insider trading might not fall within the ambit of Section 10(b), but fails to establish the novelty of any of those theories. That is, all of the interpretive arguments raised by the Petitioner in support of repealing *Dirks* could have been (and likely were) considered by the *Dirks* court. In order to overturn *Dirks*, the Petitioner would need to present evidence that circumstances have changed so much that the very criminality of insider trading should be reconsidered. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992) ("In constitutional adjudication as elsewhere in life, changed cir-

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[6] For instance, Petitioner cites the text and legislative history of Section 10(b) and the prohibition on judge-made law in support of his request for repeal of *Dirks*. Pet. Br. 22-23. However, the *Dirks* court was certainly well-aware of those issues when it rendered its decision. Similarly, the Petitioner endorses the need for the free flow of information in the securities markets, *id.* at 27, but fails to explain how that need is any more pressing now than it was in 1983.

cumstances may impose new obligations."). No such evidence has been presented.

A century ago Justice Cardozo observed that "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921). Despite his huffing and puffing, Petitioner cannot blow down the brick-house that is insider trading liability under Section 10(b). That extraordinary remedy is best left for Congress to undertake, should it decide to do so, pursuant to its legislative authority. *See* U.S. Const. Art. I, § 1.

C. The Rule of Lenity Does Not Apply Since Congress Has Repeatedly Endorsed Expansive Insider Trading Liability

The Petitioner and his *amici* argue that the Rule of Lenity favors a restrictive reading of *Dirks*' personal benefit requirement. Pet. Br. 56-57; *see also* Cato Institute *Amicus* Br. 12-16. However, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013) (citations omitted). In this case, there is no grievous ambiguity because Congress has repeatedly placed its imprimatur on an expansive view of insider trading liability.

1. The Exchange Act was passed to broadly prohibit insider trading

"Protection of investors from insiders was one of the chief reasons which led to adoption of the law which the [Securities and Exchange] Commission was selected to administer[:]" the Exchange Act. *SEC v. Chenery Corp.*, 318 U.S. 80, 99 (1943) (Black, J., dissenting). Congress passed the Exchange Act after an investigative commission headed by Ferdinand Pecora unearthed the roots of the Crash of 1929 and the consequent Great Depression, the worst economic crisis in the nation's history. One of the market ills documented by the Pecora Commission was rampant inside trading. *Blau v. Lehman*, 368 U.S. 403, 419 (1962) ("The hearings that led to the Securities Exchange Act of 1934 are replete with episodes showing how insiders exploited for their personal gain 'inside information' which came to them as fiduciaries and was therefore an asset of the entire body of security holders.").

The Exchange Act was passed to extirpate these "predatory operations." S. Rep. No. 1455, 73d Cong., 2d Sess. 68 (1934) ("Pecora Report").

> "Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. *Closely allied to this type of abuse was the unscrupulous employment of in-*

> *side information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.*"
> *Id.* at 55 (emphasis added); *see also* S. Rep. No. 792, 73d Cong., 2d Sess. 9 (1934).

Congress intended to flatly prohibit fraudulent trading based on inside information, regarding of whether that trading were done by insiders or by favored outsiders.

Pecora recounted numerous instances of trading syndicates, pools and other collaborations between insiders, outsiders and their affiliates that enabled the exploitation of secret company information by the selected few. *See, e.g.*, Pecora Report 62-63 (reciting, as but one example, the case of Chase National Bank's chairman Albert H. Wiggin, who enriched himself and members of his family through pool operations in Chase Bank stock.) These "predatory operations" bore a remarkable resemblance to the modern day tipping networks that have been the focus of prosecutors' enforcement efforts. *See id.* at 68.

Thus, the Congress that enacted the Exchange Act was very familiar with the concept of insiders tipping secret information to remote parties many links down a tipping chain. The Court may reasonably deduce that Section 10(b), "a catchall clause [designed] to prevent fraudulent practices," *Chiarella v. United States*, 445 U.S. 222, 226 (1980), was crafted to prohibit such predatory behavior.

Of course, the legislative history is silent on the exact mechanism by which an insider's fiduciary duty would

transfer to an outsider tippee, but that mere fact is immaterial. *See Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). The tone and tenor of the legislative reports behind the Exchange Act suggest an orientation towards expansive criminal liability for fraudulent misuse of secret company information. As noted above, Congress utilized broad language to prohibit fraud under Section 10(b), and it adopted Section 20 of the Exchange Act to emphasize that indirect fraud would likewise be punished. 15 U.S.C. §§ 78j, 78t(b).

Congress enacted Section 10(b) to proscribe those "manipulative and deceptive practices which have been demonstrated to fulfill no useful function." S. Rep. 792, 73d Cong., 2d Sess. 6 (1934). The Pecora Report's animadversions against "the unscrupulous employment of inside information" and other market abuses, *see id.* at 55, torpedo any notion that the 1934 Congress would have perceived the exploitation of confidential company information by tippers as serving some useful market function. Even the Petitioner declines to make any argument that Maher's particular tips of confidential information to Michael were "useful" to the markets.[7]

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[7] Indeed, the Petitioner's brief takes great pains to argue that Maher's tips to Michael were procured under duress, thereby painting Maher's tipping as a sort of necessary evil. *See* Pet. Br. 5 ("If anything, Michael bullied Maher into leaking the information").

2. Congress has continued to express preference for an expansive reading of Section 10(b)'s prohibition on insider trading

Both the Second Circuit in *Newman* and the Petitioner have argued that, post-*Dirks*, a watered-down version of the personal benefit requirement has led to excessive insider trading prosecutions. Pet. Br. 45 ("Until *Newman*, the lower courts typically rubber-stamped the government's watered-down version of the personal benefit requirement."); *see also Newman*, 773 F.3d at 448 ("The Government's overreliance on our prior dicta merely highlights the doctrinal novelty of its recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders."). However, the history of Congressional action and non-action since *Dirks* evinces a legislative ratification of expanded insider trading liability.

Since *Dirks* was decided in 1983, Congress has declined to modify Section 10(b) to redress the ostensibly overbroad personal benefit test established in that case. The Court should view this as evidence of Congressional acquiescence towards a robust personal benefit test. To be sure, "courts are slow to attribute significance to the failure of Congress to act on particular legislation." *See, e.g., Aaron v. SEC*, 446 U.S. 680, 694, n.11 (1980). Nevertheless, nonaction is deemed significant where Congress has numerous opportunities to amend a statute, has "acute awareness" of the statute's implications, and yet declines to act. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). Those factors are met here.

After *Dirks* was decided, Congress passed two statutes specifically addressing insider trading: the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), Pub. L. No. 100-704, 102 Stat. 4677 and the Insider Trading Sanctions Act of 1984 ("ITSA"), Pub. L. No. 98-376, 98 Stat. 1264. Neither statute corrects the putative overbreadth of the personal benefit test.

Congress has also modified Section 10(b) twice since *Dirks*, first in the year 2000 and subsequently in the year 2010. *See* 15 U.S.C. § 78j. Once again, neither modification placed any limits or controls on tippee liability. The 2010 amendment is particularly significant because it was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No.111-203, Tit. VII, § 762,124 Stat. 1761, the largest overhaul of the nation's financial laws since the Depression. The Dodd-Frank Act contains a plethora of new laws spanning the entire universe of securities and finance, covering everything from conflict minerals to bank bailouts. Given the breadth of Dodd-Frank, and its focus on various abuses on Wall Street, "Congress — and in this setting, any Member of Congress — [must have been] abundantly aware of" the possibility of insider trading reform. *Bob Jones Univ.*, 461 U.S. at 600-01.

The Dodd-Frank Act expanded Section 10(b) to cover security-based swaps, *see* Resp. Br. 29-30, and also to address fraud in other parts of the financial system. *See, e.g.*, Dodd-Frank Act §§ 929L, 1079A, 1100C. However, not a single provision in that wide-ranging Act corrected the judiciary's supposed rubber-stamping of the government's version of the personal benefit test.

Indeed, Congress has expressed a current antipathy towards *Newman*'s curtailment of the personal benefit test. As of today, three pending Congressional bills would statutorily define insider trading. *See* Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong. (2015); Stop Illegal Insider Trading Act, S. 702, 114th Cong. (2015); Insider Trading Prohibition Act, H.R. 1625, 114th Cong. (2015). All three of them were passed in opposition to the *Newman* decision's restrictive interpretation of the personal benefit test. *See* Bruce W. Klaw, *Why Now is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory*, 7 Wm. & Mary Bus. L. Rev. 275, 338, 342, 343 (2016) ("Klaw"). At least one of the bills, The Ban Insider Trading Act of 2015, would abandon the personal benefit requirement altogether and impose in its stead a blanket prohibition on trading on any material information that was not procured through due diligence from a publicly available source.[8] In sharp contrast, there are exactly zero pending bills that vindicate *Newman* or otherwise reduce the scope of insider trading liability.

III. THE SELECTIVE TIPPING OF SECRET COMPANY INFORMATION IS CONTRARY TO CONGRESSIONAL INTENT AND ECONOMIC EFFICIENCY

While much of academia has criticized the Second Circuit over its *Newman* decision, *see, e.g.*, Klaw at 279 ("the *Newman* case unjustifiably impedes the govern-

[8] S. 702.

ment's ability to restrain and punish tippers and tippees") (citation omitted), concern over *Newman*'s vague, overbroad terms is not purely academic. In the short time since its issuance, the *Newman* decision has been read as a veritable "Get Out of Jail Free" card for insiders and their tippees. Numerous defendants across the country (including the Petitioner) have sought to overturn their insider trading convictions or settlements under the *Newman* standard. *See, e.g.*, *United States v. Riley*, 2016 WL 158464 (2d Cir. Jan. 14, 2016). The government has even tamped down its enforcement of insider trading because of perceptions that *Newman* has made insider trading more difficult to prosecute. *See* Michael Bobelian, *As Preet Bharara Drops Seven Insider Trading Charges, Some Enforcement Might Move Out Of New York*, Forbes, Oct. 23, 2015. The *Newman* decision has sent a strong signal to would-be fraudsters that insider trading will increasingly go unpunished.

The Petitioner suggests that even if the *Newman* standard were to lead to fewer prosecutions for insider trading, that outcome would help the markets by promoting the "legitimate exchange of information." *See* Pet Br. 27. The Petitioner cites dicta in *Dirks* for the proposition that the selective tipping of inside information to information analysts plays a salutary role in the proliferation of investment news.[9] However,

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[9] *See Dirks*, 463 U.S. at 658 (noting with favor that analysts commonly meet with corporate insiders privately to "ferret out and analyze information"). The Court has consistently held that there is no general duty between all participants in market transactions to forgo actions based on material, nonpublic information. *Chiarella*, 445 U.S. at 233. That is, the average person with no connection to a security issuer has no presumed obligation to

that proposition finds no support in the Exchange Act's legislative history. The reality is that the selective disclosure of inside information to analysts hurts the markets and undermines investor confidence.

A. The Selective Tipping of Inside Information to Financial Analysts is Contrary to Congressional Intent

Congress has never espoused the position that the Exchange Act permits the selective disclosure of material, nonpublic information to financial analysts at the exclusion of the investing public at large. Instead, Congress' pronouncements on market disclosure have consistently reiterated the need for fairness and parity. For instance, in 1975, several years before the *Dirks* decision, Congress confirmed that:

> [t]he basic goals of the Exchange Act remain salutary and unchallenged: To provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities **is fair and without undue preference** or advantages among investors * * * and to provide, **to the maximum degree practicable**, markets that are open and orderly.
> H.R. Rep. No. 229, 94th Cong., 1st Sess. 91-92 (1975). (emphasis added).

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forgo trading on secret company information. *See id.* However, different rules apply for the insider, who necessarily owes a fiduciary duty to an issuer. Such insiders are not permitted to selectively tip off their relatives or friends with nonpublic information for trading purposes. *Dirks*, 463 U.S. at 664.

This proclamation expresses a fixed aversion to the selective disclosure of inside information. Never has Congress intimated that the preferential disclosure of market information to Wall Street analysts is "due." *See id.*

Indeed, to whatever extent *Dirks* can be read to endorse the right of privileged Wall Street analysts to enjoy the fruits of selective disclosure, that endorsement was at odds with the contemporaneous wishes of Congress. In 1983, the very year that *Dirks* was decided, Congress recognized that the investing public had a "legitimate expectation of honest and fair securities markets where all participants play by the same rules." H.R. Rep. No. 355, 98th Cong., 1st Sess. 5 (1983) (expressing the legislative intent behind the ITSA). Shortly thereafter, the legislative report for the ITSFEA made the common sense observation that, "small investors will be . . . reluctant to invest in the market if they feel it will be rigged against them." H.R. Rep. No. 910, 100th Cong., 2d Sess. 8 (1988). The Exchange Act was passed to protect all investors, and not just influential Wall Street analysts.

B. The Selective Disclosure of Company Information to Analysts Rigs the Markets Against Investors and is Economically Inefficient

In the decision below, Judge Rakoff sagely observed that the Petitioner's reading of the personal benefit standard would allow a corporate insider to disclose proprietary information to any third party for trading purposes, free of criminal liability, so long as the in-

sider received no tangible benefit in return. *See Salman*, 792 F.3d at 1094. The markets can only suffer from that kind of cronyism.

Most of the government's recent prosecutions for unlawful tipping have involved company insiders selectively disclosing confidential information to professional financial analysts and their associates. *See, e.g., Newman*, 773 F. 3d at 488. This phenomenon of selective disclosure to the privileged few hurts the markets in a variety of ways. For one thing, trading on inside information ahead of the market can skew natural price trends. For instance, suppose a well-heeled institutional investor is tipped off by company insiders that the company is about to report weaker-than-expected earnings. Exploiting that information, the institutional investor executes a large block-trade to short the stock, betting that the price will fall. The trading public, taking special notice of the size of the institutional investor's short sale, panics, thereby setting off a fire-sale that causes the stock price to plummet well below the true market price. In such a scenario, the selective disclosure will have enriched the institutional investor, impoverished non-insider shareholders, and produced inefficient market pricing. Had the company disclosed the negative information to all investors at the same time, it would have been able to "put reassuring contingency plans in place" to buffer the impact of that information. *See* Klaw at 326.

The selective disclosure of company information to the Petitioner's contacts – be they friends, relatives, fellow church-goers or former classmates – also allows those privileged contacts to extract wealth from the marketplace. That type of disclosure is *criminal* because the extracted wealth properly belongs to inves-

tors en masse. Such profiteering erodes public confidence in the securities market and serves "no useful function." *See* S. Rep. 792, 73d Cong., 2d Sess. 6. A market that permits Wall Street analysts to enjoy informational advantages creates incentives for disadvantaged investors to engage in corrupt actions to overcome their disadvantage. *See United States v. O'hagan*, 521 U.S. 642, 658 (1997) (citation omitted). Some investors will be pushed to refrain from trading altogether. *Id.* For example, research shows that household stock market participation decreases following corporate scandals in the state where the household resides. Mariassunta Giannetti & Tracy Yue Wang, *Corporate Scandals and Household Stock Market Participation* 2 (2015), http://bit.ly/2aZdr0x. Such decreased participation is directly due to a loss of trust in the market. *See id.*

Congress passed the ITSFEA and the ITSA out of concern that insider trading impairs capital formation and debilitates investor confidence. *See* H.R. Rep. No. 355, 98th Cong., 1st Sess. 2; H.R. Rep. No. 910, 100th Cong., 2d Sess. 8; *see also* 129 Cong. Rec. S3865 (daily ed. Mar. 23, 1983) (remarks of Sen. D'Amato); 130 Cong. Rec. H7759 (daily ed. July 25, 1984) (remarks of Rep. Wirth). Empirical research shows that Congress was correct to be thusly concerned. A survey of insider trading enforcement in 103 countries shows that lax insider trading enforcement worldwide reduced market liquidity and increased the cost of participating in the stock market by up to 7 percent. Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, 57 J. Fin. 75, 78 (Feb. 2002); *see also* Laura N. Beny, *Do Investors in Controlled Firms Value Insider Trading Laws? International Evidence*, 4 J. L. Econ. & Pol'y

267, 267 (2008) (demonstrating that stringent insider trading law is associated with great corporate valuations); Art A. Durnev & Amrita S. Nain, *Does Insider Trading Regulation Deter Private Information Trading? International Evidence*, 15 Pac. Basin Fin. J. 409, 411 (2007) (same). Lack of investor trust in the market increases the risk premiums that investors demand to participate in the market. These higher transaction costs can negatively impact a country's overall economy and credit rating. *See* Bhattacharya & Daouk 101-02; *see also United States v. Naftalin*, 441 U.S. 768, 776 (1979) ("frauds perpetrated upon . . . investors can redound to the detriment of the . . . economy as a whole.").

The selective disclosure of confidential information particularly disadvantages retail investors. No amount of due diligence will allow the lay investor to gain access to the privileged market information that is routinely made available by insiders to their institutional tipping networks. "Even supporters of legalized insider trading have noted that insider traders often obtain this 'secret' information through 'the good old boy network.'" Klaw at 307. A retail investor cannot simply contact a corporate executive and acquire insider information the way that Wall Street analysts can. As a result, the retail investor is forced to compete in the marketplace for securities with one hand tied behind his back. The framers of the Exchange Act discovered that the stock market was rigged in favor of big players, and passed the Act with the intention of correcting that problem. The Petitioner and *Newman* advance a position that flouts those framers' Congressional intent.

Thirty years ago, *Dirks* expressed solicitude for the democratizing role that Wall Street analysts can play in proliferating market information. *Dirks*, 463 U.S. at 658-59. It premised that solicitude on the assumption that alternate means of information proliferation were not available. *Id.* at 659 ("It is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally.") (emphasis added). However, the advent of the World Wide Web in the thirty years since *Dirks* undermines that central premise. Today, corporations can instantly broadcast information to the entire marketplace at zero marginal cost. To whatever extent *Dirks* endorsed the right of analysts to preferentially utilize inside information, that endorsement lacks validity due to changed technological circumstances. *See Casey*, 505 U.S. at 864 ("In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations").

One must recall that when Wall Street analysts "ferret out" company information, *Dirks*, 463 U.S. at 658, they do so for purely monetary gain, and not for the purpose of disseminating information in the way that journalists publicize hidden facts into the public domain. Defendant Chiasson in the *Newman* case was able to "ferret out" confidential information about Dell and Nvidia to the tune of $68 million. *Newman*, 773 F.3d at 443. The Second Circuit ultimately absolved Chiasson, but nonetheless failed to consider whether the "entire body of security holders," *Blau*, 368 U.S. at 419, laid any superior claim to those $68 million in profits.

The Court should reject the Petitioner's narrow reading of the personal benefit standard because that reading would benefit the privileged few while inuring to the disadvantage of the investing public at large.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondent and hold that that Section 10(b) prohibits an insider from exploiting secret company information to enrich himself or his designee, regardless of the identity of the designee or the extent of benefit received by the insider in exchange for the information.

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Respectfully submitted,

AKSHAT TEWARY
Counsel for Amicus Curiae
1974 State Route 27
Edison, NJ 08817
(732) 287-0080
info@tewary.com

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IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* DARYL M. PAYTON IN SUPPORT OF PETITIONER

SEAN HECKER
Counsel of Record
MATTHEW E. FISHBEIN
KAITLIN TERESA FARRELL
PETER SIMPSON ROSS
LAURA EMILY O'NEILL
TAZNEEN R. SHAHABUDDIN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
shecker@debevoise.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, Daryl M. Payton as *amicus curiae* respectfully submits this brief in support of Petitioner Bassam Yacoub Salman.

Mr. Payton, a remote tippee like Mr. Salman who traded on fourth-hand information, was tried and found civilly liable for insider trading in February 2016 before the Honorable Jed S. Rakoff in the Southern District of New York—the same judge who authored the *Salman* opinion below. The facts of Mr. Payton's trial provide a real-world example of how the current insider-trading laws encourage arbitrary and inconsistent enforcement.

SUMMARY OF THE ARGUMENT

As Mr. Payton's case illustrates, the current state of insider-trading law is untenable, particularly as applied to remote tippees like Mr. Salman and Mr. Payton. A key issue in Mr. Payton's trial was whether the tippee had conferred a personal benefit on the tipper, and what, if anything,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for Mr. Payton states that no counsel for a party authored this brief in whole or in part and that no person other than Mr. Payton or his counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from the parties have been lodged with the Clerk of the Court pursuant to Rule 37.3(a).

Mr. Payton knew or should have known about it. Even in light of the Second Circuit's decision in *United States v. Newman*,[2] the law on personal benefit is sufficiently ill-defined that it failed to provide any meaningful guidance on what the United States Securities & Exchange Commission ("SEC") was required to prove. Lacking any concrete evidence of a personal benefit between the tipper and tippee, the SEC told the jury that it could simply *infer* a benefit and knowledge thereof based on the tippee's and tipper's roommate relationship and because "[y]ou don't get something for nothing in this world."[3] The jury did just that.[4]

Mr. Payton joins Mr. Salman in urging this Court to define the personal-benefit requirement as a pecuniary gain that cannot be merely inferred from certain relationships. As the decision below and the application of *Newman* in Mr. Payton's case both

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[2] 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).

[3] Trial Tr. 912:3–14, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. Feb. 16–29, 2016) (hereinafter "Trial Tr.") (transcript may be viewed at the trial court's public terminal or through the court reporter until July 8, 2016, when it will be made available through PACER).

[4] Jury Verdict, ECF No. 136, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. Mar. 3, 2016); Max Stendahl, *SEC Scores Precarious Post-Newman Win in IBM Tip Trial*, Law360 (Mar. 1, 2016), http://www.law360.com/articles/765523/sec-scores-precarious-post-newman-win-in-ibm-tip-trial.

show, the government and some courts have interpreted this Court's pronouncement in *Dirks v. Securities & Exchange Commission* that a personal benefit could include "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend"[5] to mean that the government need only prove that the tippee and tipper are friends or relatives. In Mr. Payton's case, this allowed the government to prevail in circumstances where there was no proof of a personal benefit exchanged between the tippee and tipper, who were casual friends and roommates, and no proof that Mr. Payton had any knowledge, or reason to know, of the circumstances between the tippee and tipper. This approach, which provides no meaningful restrictions on the government's ability to prosecute remote tippees, allows for arbitrary and inconsistent enforcement.

Even if the Court declines to adopt the pecuniary-gain standard for the personal-benefit requirement, the judge-created tipping crime should not be extended to remote tippees who do not participate in or have knowledge of the original breach and tip. Material nonpublic information can come from a variety of sources, many of which are not improper. Since there is no blanket prohibition against trading on material nonpublic information or any statute defining the boundaries of insider trading, allowing the government to prosecute someone at the far end of a tipping chain like Mr.

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[5] 463 U.S. 646, 664 (1983).

Payton or Mr. Salman, neither of whom participated in or knew any details about the tipper's interactions with the original tippee, raises serious due process concerns.

BACKGROUND

I. The Facts of Mr. Payton's Case

A. Mr. Payton Was At The End Of A Long Tipping Chain.

In May 2009, Michael Dallas, a corporate associate at Cravath, Swaine & Moore LLP, divulged to his friend Trent Martin that Cravath's client IBM was acquiring a company called SPSS.[6] This information was material and nonpublic.[7] Mr. Martin traded on it and shared the information with Thomas Conradt, from whom Mr. Martin was subletting a room that he found advertised on Craiglist.[8] Mr. Conradt, a broker at the financial firm Euro Pacific Capital, then told several coworkers, including Daryl Payton, that SPSS was ripe for a buyout.[9] Mr. Payton at first did nothing

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[6] Amended Complaint at ¶ 48, ECF No. 32, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 2, 2015).

[7] *Id.* at ¶ 25.

[8] *Id.* at ¶¶ 54, 61; Trial Tr. 169:20–171:8, 174:17–25, 178:12–14, 179:2–10, 222:4–19, 224:7–225:6, 235:16–236:18, 295:9–11, 284:1–4, 305:18–306:1.

[9] Trial Tr. 242:15–243:5, 451:1–5.

with the information. A month and a half later, on the advice of his best friend and coworker Benjamin Durant, who had determined that SPSS was a promising buyout target, Payton traded in SPSS stock options with various expiration dates.[10] The deal was announced soon thereafter, and Payton made approximately $250,000.[11]

Several Euro Pacific employees had traded in SPSS options shortly before the announcement, triggering a government investigation and, eventually, insider trading indictments. Although Mr. Dallas, the Cravath associate, had a fiduciary duty inherent in the attorney-client relationship not to disclose material nonpublic information about his client's impending acquisition of SPSS, the government chose not to charge him. Instead, the government charged his friend *Mr. Martin* as the original source of the tip on the theory that he had breached a nebulous duty of confidentiality that he owed Mr. Dallas[12]—presumably in order to support a theory of liability with respect to the remote tippees who made money on the information. Mr. Payton was charged criminally and civilly for insider

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[10] Trial Tr. 458:20–23, 459:15–16, 500:15–501:5, 502:20–503:24, 556:20–23, 559:14–21, 569:24–570:11, 735:6–10, 744:1–16.

[11] Trial Tr. 279:14–16, 513:11–21, 576:14–577:7.

[12] Amended Complaint at ¶¶ 46–55, ECF No. 32, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 2, 2015).

trading. Mssrs. Martin and Conradt settled with the SEC and became cooperators as part of their settlement terms. Mr. Conradt later tried, unsuccessfully, to get out from under his settlement agreement.

B. Following The Second Circuit's Decision In *Newman*, The U.S. Attorney's Office Dropped The Case Against Mr. Payton, But The SEC Continued To Pursue Civil Charges.

Following the Second Circuit's decision in *United States v. Newman*,[13] which held that to establish insider trading, the government must prove that remote tippees like Mr. Payton knew that the tipper received a personal benefit in exchange for the tip, the U.S. Attorney's Office for the Southern District of New York dropped its prosecution of Mr. Payton and the other brokers who had traded.[14] The SEC, however, continued to pursue civil insider trading charges against Mr. Payton. The case went to trial against Mssrs. Payton and Durant in February 2016.

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[13] 773 F.3d 438.

[14] *See Nolle Prosequi* Order, ECF No. 170, *United States v. Conradt et al.*, No. 12-cr-00887-ALC (S.D.N.Y. filed Feb. 3, 2015).

C. The SEC's "Proof" Of Personal Benefit Was That The Tippee Was A Pleasant Roommate.

The SEC's evidence purportedly showing that Mr. Martin tipped Mr. Conradt in exchange for a personal benefit was somewhere between razor-thin and nonexistent, and unsupported by its own cooperators' testimony. The SEC presented evidence showing that around the time Mr. Martin tipped Mr. Conradt, Mr. Conradt "conferred" the following "benefits" on Mr. Martin:

- Menial apartment chores that he did for himself, including asking the landlord to fix the buzzer and repair a leaky ceiling outside Mr. Conradt's bedroom, hiring a cleaning lady that all of the roommates paid for, and calling 311 to have a smelly truck removed from the street outside Mr. Conradt's bedroom window;[15]

- Negotiating a rent reduction, during which Mr. Martin found out that Mr. Conradt and their third roommate had been fleecing Mr. Martin for over half of the rent, and, after which, Mr. Martin continued to pay a disproportionately high share[16]; and

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[15] Trial Tr. 118:4–127:20, 300:7–25.

[16] Trial Tr. 141:3–142:22, 294:18–299:21.

- Forwarding to Mr. Martin a google search of defense attorneys—none of whom Mr. Martin hired—when Mr. Martin was arrested for a drunken stunt.[17]

Both Mr. Martin and Mr. Conradt testified that these were wholly unrelated to the tip,[18] and were not even benefits to Mr. Martin.[19] Mr. Martin

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[17] Trial Tr. 154:21–155:13, 303:8–304:4–6.

[18] Trial Tr. 285:19–287:20, 293:6–294:1, 963:15–23, 964:12–17; SEC Ex. 611 (Martin Tr.) at 22:15–21, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 1, 2016) (hereinafter "Martin Tr."), ("Q: Okay. Did you receive anything from Mr. Conradt in exchange for telling him about SPSS? A: No I didn't. Q: Did you provide him with the information about SPSS because of any personal benefits that he had conferred to you in the past? A: No, I didn't."); 23:2–14 ("Q: Did your decision to share the information with Mr. Conradt have anything to do with Mr. Conradt's role in obtaining a rent reduction in the apartment? A: No, it didn't. Q: Did it have anything to do with his arranging repairs in the apartment? A: No, it didn't . Q: Did it have anything to do with his arranging to have the buzzer in the apartment fixed? A: No, it didn't."); 39:20–40:16 ("I didn't provide the tip in exchange for help with the legal case."). Because Mssrs. Martin and Dallas testified via video deposition, their testimony was entered on the record as exhibits.

[19] Trial Tr. 105:20–24, 117:12–118:1, 301:5–9, 304:4–9; Martin Tr. at 38:7–9 ("Q: Did you consider Mr. Conradt's assistance to be of any value? A: No, not really."); 170:24–171:7 ("Q: Do you know what [Mr. Conradt is] talking about when he writes 'the buzzers and the roof'? A: I don't know. Maybe the buzzer was broken from the door to our

testified that he actually told Mr. Conradt about SPSS because he wanted to talk to someone about the appropriateness of his trades and Mr. Conradt happened to be around and had gone to law school,[20] and that he did not provide the SPSS information in exchange for any benefit that he had received or expected to receive from Mr. Conradt.[21] Likewise,

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apartment and the roof might have been leaking, maybe. I'm only guessing.").

[20] Martin Tr. at 17:11–18:11 ("Q: Okay. And why did you speak to Mr. Conradt? A: At the time I was concerned around the – whether or not it was legal to trade in the SPSS, after what Mike Dallas had told me. Tom Conradt was a lawyer who worked in the securities industry. He was also, you know, someone who was there in the apartment at the time and, you know, I was trying to ascertain, you know, what the implications were from trading the stock and, you know, whether it was illegal .").

[21] *Id.* at 22:15–23:14 ("Q: Okay. Did you receive anything from Mr. Conradt in exchange for telling him about SPSS? A: No, I didn't. Q: Did you provide him with the information about SPSS because of any personal benefits that he had conferred to you in the past? A: No, I didn't. Q: Did you expect to receive anything from him in the future as a result of sharing the information with him? A: No, I didn't. Q: Did your decision to share the information with Mr. Conradt have anything to do with Mr. Conradt's role in obtaining a rent reduction in the apartment? A: No, it didn't. Q: Did it have anything to do with his arranging for repairs in the apartment? A: No, it didn't. Q: Did it have anything to do with his arranging to have the cable bill reduced? A: No, it didn't. Q: Did it have anything to do with his arranging to have the buzzer in the apartment fixed? A: No, it didn't.").

Mr. Conradt testified that he never gave Mr. Martin anything in exchange for the SPSS information and that Mr. Martin never expressed that he expected a benefit in return for the information.[22]

Nor was there evidence suggesting that Mr. Martin and Mr. Conradt had a close personal relationship which might somehow substitute for evidence of a pecuniary exchange. Both Mr. Martin and Mr. Conradt testified that they were not close friends.[23] Mr. Martin and Mr. Conradt only first met in the fall of 2008 when Mr. Martin responded to a Craigslist advertisement for the apartment Mr. Conradt shared with another roommate, and they hung out in the apartment on occasion.[24] Mr. Martin

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[22] Trial Tr. 285:19–286:11.

[23] Trial Tr. 99:9–19; Martin Tr. at 14:4–13 ("Q: Did you consider Mr. Conradt to be a close friend? A. No, I didn't. Q: Did you consider him to be a friend at all? A: I would say he was a friend, yes, so we often hung out in the apartment together and— Q: Yes, go ahead. A: Yes, but, as I said before, he – you know, it was really just sort of like a roommate friend, not like a close friend I'd go and hang out with.").

[24] Martin Tr. at 10:9–16 ("Q: Okay. When did you first meet Mr. Conradt? A: I met him around October 2008. Q: Did you know him before you moved into this apartment with him? A: No, I didn't. Q: So what were the circumstances that led you to move into the apartment? A: I saw the apartment listed on Craigslist."); Trial Tr. 91:12–13.

did not invite Mr. Conradt to his 30th birthday party.[25]

The SEC presented no evidence that Payton knew anything about either Mr. Martin's purported breach of Mr. Dallas's trust or Mr. Conradt's purported personal benefit to Mr. Martin. The undisputed facts were that Mr. Payton had never heard of the Cravath associate Mr. Dallas, and had only briefly met Mr. Martin once in passing and knew virtually nothing about him.[26]

D. The SEC Argued The Jury Could Simply Infer A Personal Benefit Since "You Don't Get Something For Nothing In This World."

During summations, the SEC implied that the jury need not identify a specific personal benefit at all. Instead, the SEC urged the panel to infer that because Mr. Martin would not have wanted to give something for nothing, he must have received a personal benefit:

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[25] SEC Ex. 612 (Dallas Tr.) at 121:14–122:8, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 1, 2016), ("Q: You talked a little bit earlier or you testified a bit earlier about Trent Martin's 30th birthday party; do you recall that? Q: Do you remember Tom Conradt being there? A: I don't recall meeting Tom or Tom being there, no."); Trial Tr. 307:12–308:2.

[26] Trial Tr. 580:14–25; 447:21–448:4.

> When you think of all the evidence you saw relating to benefits, think about what you know about your own lives. You don't get something for nothing in this world. . . . So use your common sense. Why would anyone pass on information like this without receiving a benefit? I suggest to you that they wouldn't.[27]

The SEC also argued that the jury could simply infer the scienter element—that Payton knew or should have known[28] Mr. Martin tipped Mr. Conradt in breach of a duty and in exchange for a personal benefit—without pointing to any specific evidence supporting it. The SEC argued that because Payton was an experienced trader, he "had reason to know that the information was coming in breach of a duty because [he] knew that this was the type of information that doesn't just get out to the market,"[29] and, by the same logic, he "had reason to know that Martin was breaching a duty passing to Thomas Conradt."[30]

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27 Trial Tr. at 912:3–14.

28 This scienter standard only applies in civil cases; in criminal cases, the standard is actual knowledge. *See* Br. for Pet. at 49, *Salman v. United States*, No. 15-628 (filed May 6, 2016) (describing willfulness requirement); *id.* at 58 (discussing actual knowledge of benefit requirement under *Dirks*, *Newman*, and general principles of criminal law).

29 Trial Tr. at 914:23–915:20.

30 *Id.* at 915:23–916:6.

The jury delivered a verdict finding Mr. Payton liable for insider trading. It is clear from the jury's notes and the comments of individual jurors to the press after the verdict that the jury was confused about the personal benefit and scienter requirements.

E. The Jury Was Confused About The Personal Benefit And Scienter Elements, And Inferred Both Without Proof Of Either.

During deliberations, the jury sent a note asking the court to clarify the scienter requirement. The jury asked the court to elaborate on the instruction that the scienter element "can be satisfied if you find that the defendant you are considering was aware of a high probability that someone had improperly disclosed the inside information to Mr. Conradt for personal benefit" "as it relates to high probability and personal benefit of the person providing the information."[31]

Immediately after the jury rendered its verdict, several jurors told reporters that the jury panel was "confused by the issue" and had failed to identify *any* specific personal benefit in reaching its verdict.[32] They reported that the jury thought the

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31 Trial Tr. 1098:18–25; 1101:2–3 (emphasis in jury note).

32 Stendahl, *supra* note 4.

SEC's proof of personal benefit—that Mr. Conradt provided a personal benefit through his role as a helpful roommate and also through his assistance following Mr. Martin's arrest—was "nonsense."[33] The jury determined, however, that it was enough that "the participants in the alleged scheme had acted out of a general desire to make money"[34] and that the defendants were "sophisticated traders who should have known that a benefit was likely exchanged."[35] The jurors had inferred the requisite scienter, just as the SEC had encouraged them to in its summation.[36] As one juror put it, "[w]e just assumed that you can't just believe someone would give this kind of information without expecting a benefit."[37]

ARGUMENT

I. The Existing Law Of Insider Trading Is Untenable, Particularly As Applied To Remote Tippees.

Although this Court has repeatedly held that trading on material nonpublic information is not

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33 *Id.*

34 *Id.*

35 *Id.*

36 Trial Tr. 912:5.

37 Stendahl, *supra* note 4.

illegal,[38] the judge-created law of insider trading provides no meaningful guidance between legal and illegal conduct and, as happened in Mr. Payton's case, is subject to arbitrary enforcement by regulators. As this Court has observed, "[w]ithout legal limitations, market participants are forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous[.]"[39] Such concerns are exponentially magnified when applied to remote tippees. Mr. Payton's case illustrates the hazard of relying "on the reasonableness of the SEC's litigation strategy,"[40] and demonstrates how the current legal framework encourages inconsistent enforcement.

A. Mr. Payton's Case Demonstrates That The Court Should Adopt The Pecuniary-Gain Standard For The Personal-Benefit Requirement.

The Court should, as Mr. Salman argues, reject the Ninth Circuit's holding that evidence of a certain relationship between the tipper and tippee

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38 *Chiarella v. United States*, 445 U.S. 222, 229 (1980) ("a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts"); *Dirks v. Sec. & Exch. Comm.*, 463 U.S. 646, 657 (1983) ("only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information").

39 *Dirks*, 463 U.S. at 664 n.24.

40 *Id.*

suffices to demonstrate that the tipper received a benefit and instead hold that, consistent with *Newman*, the government must prove a pecuniary gain to establish insider trading.[41] Mr. Payton's case, however, illustrates that even under *Newman*, there is the danger that, unless this Court makes clear that a personal benefit may not be simply inferred from a personal relationship between the tipper and tippee, courts may permit the government to satisfy its burden by proving only minimal ties between the tipper and tippee in misplaced reliance on *Dirks'* language that a "personal benefit"[42] could include "a gift of confidential information to a trading relative or friend."[43] This interpretation of *Dirks* renders the Court's restrictions on insider trading liability meaningless and should be clarified.

During Mr. Payton's trial, the SEC presented a number of "benefits" that Mr. Conradt purportedly conferred on Mr. Martin in exchange for the tip—menial chores, negotiating a rent reduction for himself (after which Mr. Martin continued to pay a disproportionately high share of the rent), and forwarding a google search of defense attorneys. These all fall far short of the objective personal benefits required under this Court's decision in

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41 *See* Br. for Pet. at 28–30, *Salman v. United States*, No. 15-628 (filed May 6, 2016).

42 *Dirks*, 463 U.S. at 664.

43 *Id.*

Dirks.[44] Sensing that the jury would, as it did, conclude that these personal-benefit arguments were "nonsense,"[45] the SEC changed tack and argued that a personal benefit could be simply *inferred* from Mr. Martin's and Mr. Conradt's relationship and the "common-sense" notion that one does not disclose information without getting something of value in return.[46] As several jurors reported to the press immediately after they rendered a verdict against Mr. Payton, this argument carried the day.[47]

Permitting insider trading liability on this basis all but eviscerates the requirement that the inside information be exchanged for a personal benefit. This is because in nearly every insider trading case, the tipper and tippee will have some sort of preexisting relationship sufficient to infer that the tip was a gift since, as the SEC put it, "[y]ou don't get something for nothing in this world."[48] Its effects are compounded when applied to remote tippees, who (like Mr. Payton) could be found to have the requisite scienter simply because the

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[44] 463 U.S. at 663 (to establish insider trading, government must show "a pecuniary gain or a reputational benefit that will translate into future earnings").

[45] Stendahl, *supra* note 4.

[46] Trial Tr. 912:3–14.

[47] Stendahl, *supra* note 4.

[48] Trial Tr. 912:3–14

government argues that the tippee deduced the exchange of a personal benefit based on the nature of the information.[49]

B. Mr. Payton's Case Demonstrates That The Court Should Decline To Extend The Judge-Created Tipping Crime To Remote Tippees.

Mr. Payton's case also illustrates why, even if the Court declines to adopt the pecuniary-gain standard for the personal-benefit requirement, the judge-created tipping crime should not be extended to remote tippees who do not participate in or have knowledge of the original breach and tip. The Court has never held that the crime of insider trading covers remote tippees, and nor should it.

First, the misappropriation theory of insider trading can become completely divorced from reality as the government charges tippees further down the chain. Remote tippee liability in misappropriation cases like Mr. Payton's and Mr. Salman's is based on the theory that the remote tippee stands in the shoes of the original tipper, who defrauded someone by misappropriating his or her information in breach of a fiduciary duty.[50] In Mr. Payton's case, the SEC

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[49] *Id.* at 915:23–916:6.

[50] *See United States v. O'Hagan*, 521 U.S. 642, 652 (1997) ("In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's *deception of those*

charged him under the completely fictitious theory that *Mr. Martin* was the original tipper who violated a duty of trust and confidence to his friend *Mr. Dallas*—the Cravath associate who disclosed all of the details of the SPSS acquisition in the course of boasting to his friend about his work. Thus, under the SEC's theory of the case, Mr. Payton's "crime" was that he *defrauded Mr. Dallas* by trading on the SPSS information.

In reality, of course, no one defrauded Mr. Dallas. Far from being a victim, Mr. Dallas was the true tipper who violated a fiduciary duty to his firm's client by sharing information with his close friend Mr. Martin about the pending SPSS acquisition. But the government did not charge the case that way, presumably because doing so would have made it more difficult to prove the elements of insider trading against remote tippees like Mr. Payton who had never even heard of Cravath, Mr. Dallas, or Mr. Dallas's friendship with Mr. Martin. Extending insider trading liability to remote tippees not only allows, but actually encourages, the government to concoct charging theories that do not comport with reality.

Second, inasmuch as there is no blanket prohibition against trading on material nonpublic

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who entrusted him with access to confidential information.") (emphasis added); *Newman*, 773 F.3d at 447 ("the tippee's liability derives *only* from the tipper's breach of a fiduciary duty, *not* from trading on material, nonpublic information") (citing *Chiarella*, 445 U.S. at 233).

information or statute defining the boundaries of insider trading, prosecuting someone in Mr. Payton's position raises meaningful due process concerns. Material nonpublic information can come from a variety of sources, many of which are not improper. For example, it is legal to trade on material nonpublic information found in a briefcase mistakenly left on the subway or overheard at a restaurant. Remote tippees like Salman, Newman, and Payton are often traders at the end of an attenuated tipping chain who learn of potentially market-moving information second-, third-, or in Mr. Payton's case, fourth-hand, and have no ability to discern between material nonpublic information and a rumor.[51] Rarely do remote tippees directly participate in any fraud or betrayal of the owner of the confidential information, since they are typically far removed from that transaction.[52]

Remote tippee cases are also more susceptible to hindsight bias, which distorts the judgment of prosecutors, regulators, and juries when evaluating how such information made its way to the remote tippee, particularly when those individuals have made substantial trading profits on what turned out to be reliable material nonpublic information.[53]

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[51] *See, e.g.*, Trial Tr. 459:11–23, 495:15–23, 499:21–500:8 (describing SPSS information as a "rumor").

[52] *Newman*, 773 F.3d at 448 (collecting cases).

[53] *See* Mitu Gulati et al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774 (2004) ("Hindsight blurs the distinction between fraud and mistake. People consistently overstate

Casual conversations regarding market speculation or momentum take on heightened importance in hindsight; mere rumors become solid, "good-as-gold"[54] information once proven to be true.

By declining to extend the judge-created tipping crime to remote tippees who do not participate in the original breach and tip, the Court will prevent arbitrary and inconsistent enforcement in circumstances where the line between legality and illegality is ill-defined and not delineated by statute.

CONCLUSION

It is a due-process imperative that the Court clearly delineate legal and illegal trading and establish a "guiding principle" dictating market participants' conduct.[55] For the reasons stated above, Mr. Payton as *amicus curiae* respectfully urges the court to reverse the judgment of the Ninth Circuit Court of Appeals and to define the personal-benefit requirement as a pecuniary gain that cannot

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what could have been predicted after events have unfolded—a phenomenon psychologists call the hindsight bias. People believe they could have predicted events better than was actually the case and believe that others should have been able to predict them. Consequently, they blame others for failing to have foreseen events that reasonable people in foresight could not have foreseen.") (internal citations omitted).

[54] Trial Tr. 33:23–34:9.

[55] *Dirks*, 463 U.S. at 664.

be merely inferred from certain relationships, or hold that the judge-created tipping crime should not be extended to remote tippees who do not participate in the original breach and tip.

Respectfully submitted,

SEAN HECKER
Counsel of Record

MATTHEW E. FISHBEIN
KAITLIN TERESA FARRELL
PETER SIMPSON ROSS
LAURA EMILY O'NEILL
TAZNEEN R. SHAHABUDDIN

DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
shecker@debevoise.com

Counsel for Amicus Curiae
Daryl M. Payton

No. 15-628

IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF NEITHER PARTY

A. ROBERT PIETRZAK
JOSEPH MCLAUGHLIN
DANIEL A. MCLAUGHLIN
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, N.Y. 10019
(212) 839-5300

CARTER G. PHILLIPS*
KWAKU A. AKOWUAH
REBECCA S. LEVENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an insider trading proceeding brought under the "personal benefit" rule established by *Dirks* v. *SEC*, 463 U.S. 646 (1983), requires proof, based on objective facts and circumstances, that the tipper obtained, directly or indirectly, something of a "pecuniary or similarly valuable nature," consistent with the holding of *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015), and if so, whether a case alleging an unlawful tip to a family member must be based on similar proof.

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the voice of the U.S. securities industry, representing broker-dealers, banks and asset managers. Along with their nearly 900,000 employees, SIFMA's members facilitate access to the capital markets; they have raised over $2.4 trillion for U.S. businesses and municipalities; serve clients with over $16 trillion in assets; and manage more than $62 trillion in assets for individual and institutional clients, including mutual funds and retirement plans. SIFMA has offices in New York and Washington, D.C., and is the U.S. regional member of the Global Financial Markets Association (GFMA). Further information about SIFMA can be obtained at http://www.sifma.org.

SIFMA believes that strong and clear rules against insider trading contribute to the efficiency and fairness of the U.S. securities markets. Its members take seriously their obligation to comply with the insider trading laws, and devote significant effort to educating their employees about these laws and supervising their activities. Further, many have adopted company policies that restrict trading in ways that go beyond the requirements of law.

SIFMA also has a strong interest in clarity and predictability in the law. SIFMA members employ thousands of analysts, asset managers, traders, advisors and others whose daily duties involve

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[1] Pursuant to Rule 37.6, *amicus* affirm that no counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioner and respondent have each consented in writing to the filing of this *amicus* brief.

seeking to advance their own—and ultimately, the market's—grasp of information about public companies. Vague or unpredictable rules about what information may form the basis of trading decisions therefore create undue compliance burdens and legal risks for SIFMA's members and their employees.

SUMMARY OF ARGUMENT

This Court has long recognized that market analysts, investment managers, traders, and other market professionals play a vital informational role in the operation of the securities markets. Analysts and their counterparts are employed by a wide range of financial firms, including investment banks, broker-dealers, mutual funds, and insurance companies. But they broadly share a common mission: to develop new insights about the companies they follow and the valuation of securities issued by those companies.

The Court's path-marking decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983), properly recognized the importance of this function to the "preservation of a healthy market." As the Court explained, "[i]t is commonplace for analysts to ferret out and analyze information," including "by meeting with and questioning corporate officers and others who are insiders" at the companies. *Id* at 658. Information obtained in this way "normally may be the basis for judgments as to the market worth of a corporation's securities," even if that information has not yet been widely disseminated by the company. *Id.* at 659. And "market efficiency in pricing is significantly enhanced by [analysts'] initiatives to ferret out and analyze information, and thus the analyst's work redounds to the benefit of all investors." *Id.* at 658 n.17.

Dirks accordingly rejected the SEC's request for a broad federal rule prohibiting all trading on material non-public information that originated with corporate insiders. Instead, drawing on traditional fiduciary principles that bar insiders from "personally using undisclosed corporate information to their advantage" or from "giv[ing] such information to an outsider for the same improper purpose of exploiting the information for their personal gain," *Dirks* held that the recipient of such information—a "tippee"—likewise may not knowingly exploit an insider's decision to disclose company information for the insider's "personal gain." *Id.* at 659-60.

Dirks cautioned as well that insider trading, so defined, may also occur when "an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664. Yet, likely because *Dirks* did not involve any such "gift," the Court did not provide detailed guidance as to how to determine whether such a disclosure may give rise to a valid inference that an insider *personally* benefited from the trading profits of a family member or friend.

Recent developments demonstrate the need for further instruction on this issue. The criminal prosecution in *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015), is a case in point. There, the government contended that the requisite "personal benefit" to the tipper could be validly inferred from casual social connections that the tipper and initial tippee shared, such as attendance at the same business school or church, or at the same social gatherings. When the Second Circuit reversed, holding that only "meaningfully close personal relationships" can support a "personal benefit" prosecution, *id.* at 452, the government objected in the strongest terms, arguing that "an

insider need not be specially attached to his friends and relations in order to decide for his own personal reasons to confer on them a gift of inside information." Petition for Certiorari at 20, *United States* v. *Newman*, No. 15-137 (July 2015).

The government's broad understanding of what constitutes a "gift" actionable under *Dirks*, if adopted, would create significant uncertainty for SIFMA's members and their employees, who receive vast quantities of information about companies from many sources, some known, some unknown, some of uncertain reliability. In addition to companies' SEC filings, press releases and other formal communications, these sources can include the financial press, presentations at investor conferences, blogs, chat rooms, unsolicited tips, rumors, informal analyst networks or social-media platforms like Facebook and Twitter. To the extent that analysts and other SIFMA member employees interact directly with employees of public companies, such interactions over time can take on some of the characteristics of a social or personal relationship. But contrary to the government's position, neither criminal nor civil insider trading liability should turn on whether two people may be described as friends in a casual sense. Any such rule would be unworkable because, as ordinary experience shows, business and personal relationships are constantly in flux, and there is no clear dividing line between casual friendship and simple acquaintance. Legal liability should not turn on that inherently uncertain distinction.

SIFMA respectfully submits, therefore, that insider trading liability should not turn solely on notions of friendship or family relationship alone, but should instead focus on proof that the tipper obtained, directly or indirectly, something of a "pecuniary or

similarly valuable nature," consistent with the Second Circuit's conclusion in *Newman*, 773 F.3d at 452. That test would preserve consistency with the core rule announced in *Dirks*: insider trading liability for a tippee must rest on evidence of "objective facts and circumstances" that would support a reasonable inference that the tippee's trading profits are, in practical effect, the tipper's own. *Dirks*, 463 U.S. at 664.

ARGUMENT

The decision below appears at points to suggest that in criminal insider-trading cases, the critical "element of breach of fiduciary duty" invariably "is met where an 'insider makes a gift of confidential information to a trading relative or friend," even if the ties that bind the two are weak or casual. Pet. App. 16. So read, the decision in *Salman* stands in considerable tension with the Second Circuit's decision in *Newman*, which held that "the mere fact of a friendship, particularly of a casual or social nature," is not by itself sufficient to establish liability. *Newman*, 773 F.3d at 452.

To be sure, the *Salman* and *Newman* cases present quite different facts. *Salman* involves trading tips exchanged among family members, whereas *Newman* presented questions about the scope of tipping liability where business relationships were alleged to intersect with elements of social relationships. Regardless, the Court's decision here on what constitutes a "personal benefit" under *Dirks* will likely influence how courts view cases that present factual circumstances more akin to *Newman*, and thus far more directly implicate SIFMA's core concern of ensuring that financial market professionals are governed by workable and predictable rules

that provide clear guidance about whether they may act on information that they receive in the ordinary course of their business.

Thus, while SIFMA does not take a position on whether the conviction in this case should be sustained, SIFMA does urge the Court to reaffirm that the rule adopted in *Dirks* to distinguish between lawful and unlawful market conduct does not turn on the vagaries of whether and when a business relationship has developed into acquaintance and whether and when acquaintance has developed into friendship. In tippee liability cases, a court's inquiry should instead look to the character of the exchange, and to whether the insider sought ultimately to extract pecuniary value in exchange for the disclosure.

I. FINANCIAL INSTITUTIONS NEED INSIDER TRADING RULES THAT ARE CLEAR AND PREDICTABLE.

SIFMA begins from a premise that should be uncontroversial: The law of insider trading should be structured in a way that allows analysts and other financial market professionals to determine, quickly and with confidence, whether any information in their possession is off-limits to their research and trading activities. This is a critical concern for SIFMA because SIFMA's members distill vast quantities of information into ratings, recommendations and trading decisions, and process huge numbers of trades in connection with managing $16 trillion in broker-dealer assets and $34 trillion of investment advisor assets. See Sec. Indus. & Fin. Mkts. Ass'n, *2015 Year in Review: Invested in America* 7 (2016), http://www.sifma.org/issues/item.aspx?id=8589958792.

SIFMA members take seriously their legal obligations, including the need to prevent violations of the insider trading laws. Section 15(g), 15 U.S.C. § 780(g), of the Securities Exchange Act of 1934 requires broker-dealers to maintain policies and procedures reasonably designed to prevent the illegal misuse of material nonpublic information by the firm and its employees, and more broadly, one industry survey found that securities firms collectively spent more than $23 billion on compliance activities in a single year—a figure that accounted for 13.1% of their net revenue.[2] SIFMA members also adopt policies that enhance their ability to oversee trading compliance, such as by requiring employees to trade only through in-house accounts and prohibiting employees from trading in certain securities during specified periods.

These compliance efforts—and others tailored to the varying needs of SIFMA's diverse membership—can best succeed when firms and their employees have clear guidance about the legal rules governing trades on the basis of material non-public information. If the law sets clear standards about the kinds of transactions and other activities that are prohibited, it will be easier and less costly for securities firms to design and implement appropriate policies, and easier for employees to conform their conduct to those requirements. In contrast, where guidance of this kind is lacking, "neither corporate insiders nor analysts can be sure when the line is crossed." *Dirks*, 463 U.S. at 659 n.17, and serious due process concerns are raised by the absence of "fair

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[2] *See* Sec. Indus. Ass'n, *Survey Report, The Costs of Compliance in the U.S. Securities Industry* 5 (Feb. 2006), http://www.sifma.org/uploadedfiles/research/surveys/costofcompliancesurveyreport(1).pdf?n=87212

notice of what is prohibited." *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)); see also *id.* (noting due process roots of the rule that "regulated parties should know what is required of them so they may act accordingly" (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972))).

Clear guidance is particularly warranted because SIFMA's members and employees frequently learn information through communications with company officers and employees. This Court went to considerable lengths in *Dirks* to acknowledge the general legitimacy of informational exchanges between professionals, emphasizing that information obtained in this way, even if non-public, "normally may be the basis for judgments as to the market worth of a corporation's securities." See *Dirks*, 463 U.S. at 659. Similarly, testimony adduced at trial in *Newman* showed that "analysts routinely solicited information from companies in order to check assumptions in their models in advance of earnings announcements" and that "investor relations departments routinely assisted analysts with developing their models." 773 F.3d at 454.

With these kind of company-analyst exchanges firmly in mind, *Dirks* accordingly aimed to establish a clear and consistent general framework for insider trading cases involving tippers and tippees. The Court rightly emphasized that it was "essential" to have "a guiding principle for those whose daily activities must be limited and instructed by the S.E.C.'s inside-trading rules," *Dirks*, 463 U.S. at 664, so as to avoid chilling their ability to seek out and act upon information in a way that improves the efficiency of financial markets in valuing companies.

That core concern has echoed across this Court's securities law decisions, which frequently have emphasized the importance of crafting liability rules that are characterized by "certainty and predictability." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)); see also *Pinter*, 486 U.S. at 654 n.29 (if a "test produces unpredictable results, it risks over-deterring" lawful securities market activities). Absent clear and predictable liability rules, market professionals would be exposed to enforcement decisions that are "'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Cent. Bank*, 511 U.S. at 188. That sort of "shifting and highly fact-oriented disposition" has not been viewed as a "satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Id.* Indeed, it would be particularly inappropriate for criminal insider trading prosecutions to rest on such a foundation for, as this Court repeatedly has stated, the "construction of a criminal statute must be guided by the need for fair warning." *Crandon* v. *United States*, 494 U.S. 152, 160 (1990); see also, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994).

That traditional lenity principle should operate with special force here, where the judiciary has developed a common-law jurisprudence of "tipping" liability without any express direction from the legislature. See *Dirks*, 463 U.S. at 653-55 (describing common-law development of insider trading doctrine). As this Court has previously cautioned, judicially-created liability rules should not be expanded beyond their existing contours without Congressional authorization, see, *e.g.*, *United States*

v. *Skilling*, 561 U.S. 358, 409-11 (2010), consistent with the principle that "legislatures and not courts should define criminal activity." See *United States* v. *Bass*, 404 U.S. 336, 348 (1971); see also *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

If the markets are to operate with optimal efficiency, it is critical that the analyst (and any compliance officer asked to assist) be able to quickly and reliably determine whether trading and recommendations are permitted or prohibited in the circumstances presented. But that can occur only if the insider trading rules are themselves clear and predictable.

II. RECENT ENFORCEMENT ACTIONS UNDER "PERSONAL BENEFIT" THEORIES HAVE CONTRIBUTED TO INCREASING VAGUENESS AND LACK OF CLARITY ABOUT THE SCOPE OF THE INSIDER TRADING PROHIBITION.

The record of enforcement under *Dirks* well illustrates the need for additional clarification about the meaning and application of the "personal benefit" test. Both the SEC and criminal prosecutors frequently have resorted to "doctrinal novelty," *Newman*, 773 F.3d at 448, to bypass any obligation to prove a *quid pro quo*, *i.e.*, that the tipper received something of identifiable value for the information provided. They instead allege that the tips amounted to a "gift" of information to a casual friend or business associate. In some of these cases, the alleged benefit to the tipper was as ephemeral as the supposed enhancement of the tipper's "reputation," or, more fleeting still, the inflation of the tipper's "ego." In others, courts have declared that the fact of disclosure alone is sufficient to prove a "personal benefit"—a clearly erroneous conclusion that strips

the "personal benefit" requirement of all meaning. The practical result has been unpredictability and uneven application of the insider trading laws, as courts have grappled with how to apply a watered-down "personal benefit" standard that is supposed to provide some "guiding principle," *Dirks*, 463 U.S. at 664, and yet in the view of some courts can be satisfied in a variety of *sui generis* ways.

These practical concerns are compounded by the transformational changes in information technology that have unfolded in recent years. Today, market professionals may cull information from a wide variety of sources, including social media and other platforms that in various ways can conceal the origins of information, even while multiplying the potential paths of travel across informal networks. The oft-observed result is that it is easier and cheaper than ever for individuals who have a limited personal connection to exchange information on any subject, and without ever meeting in person. For example, a company insider may post information about the company on Twitter; the analyst who sees the tweet may not know what relationship the speaker has to the company; whether the officer or employee is authorized to release the information; or the number of other people who have seen the information.[3]

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[3] The SEC's Regulation FD, 17 C.F.R. § 243.100 (2011), was adopted to limit the range of selective disclosures that corporate insiders may make, but the regulation has significant limitations. It does not cover all company insiders and is sometimes misunderstood or misapplied by those who are covered. Thus, as the evidence described in *Newman* well illustrates, *see* 773 F.3d at 454-55, Regulation FD has not stemmed all disclosures of potentially material nonpublic information, nor has it resolved all ambiguity about the permissible use of such information by those who receive it—

An analyst who turns to the case law for guidance about how to handle the avalanche of available information will find little that usefully identifies the material that falls outside the general rule stated in *Dirks*, *i.e.*, that information obtained from companies through professional exchanges "normally may be the basis for judgments as to the market worth of a corporation's securities," *id.* at 659.

Some of the cases simply cannot be reconciled with *Dirks*, insofar as they suggest that an allegation that an insider "disclosed material non-public information," standing "alone," is "enough to allow the Court to find an adequate allegation as to the personal benefit element as well." *SEC* v. *Blackwell*, 291 F. Supp. 2d 673, 692 (S.D. Ohio 2003); see also *SEC* v. *Blackman*, No. 3:99-1072, 2000 WL 868770, at *9 (M.D. Tenn. May 26, 2000) ("[T]he mere fact of [the tipper's] disclosure of this information sufficiently alleges a gift by him to the other defendants so as to satisfy the personal benefit requirement of *Dirks*.").

Other cases unhelpfully tell the analyst that "[t]he showing needed to prove an intent to benefit is not extensive," *SEC* v. *Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003), or, to essentially the same effect, suggest that a damning "personal benefit" inference may be drawn from behavior that would be viewed as benign in virtually any other context. For example, in one controversial case, the SEC settled enforcement charges with a CEO who allegedly corrected estimates previously furnished to analysts in an effort to avoid injury to his professional reputation and his "continued earnings power." See *SEC* v. *Stevens*, SEC

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including ambiguities that may arise because of conflicting recollections about whether the company insider asked the recipient to hold the information in confidence.

Litigation Release No. 12813, 1991 WL 296537, at *1 (Mar. 19, 1991). A leading commentator described this charge as "trivializ[ing] *Dirks*." John C. Coffee, Jr., *The SEC and the Securities Analyst*, N. Y. Law J., May 30, 1991, at 5. And unfortunately, there have been many subsequent examples of similar enforcement actions. See, *e.g.*, *SEC* v. *Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (tipper often went to tippee for help with local chamber of commerce matters and may have been motivated to maintain a "useful networking contact"); *Yun*, 327 F.3d at 1280-81 ("personal benefit" could be inferred from "friendly" and collaborative relationship between co-workers; jury could conclude that the tipper "expected to benefit from her tip . . . by maintaining a good relationship between a friend and frequent partner in real estate deals"); *SEC* v. *Andrade*, C.A. No. 15-231 S, 2016 WL 199423, at *4 (D.R.I. Jan. 15, 2016) ("personal benefit" inferred from allegation that tipper "personally went with one of his property service vendors to [tippee's] home to help resolve a septic issue for" the tippee); *SEC* v. *McGinnis*, No. 5:14-cv-6, 2015 WL 5643186, at *19 (D. Vt. Sept. 23, 2015) (exchange of family gifts on "customary gift-giving occasions" relevant to benefit); *SEC* v. *Downe*, 969 F. Supp. 149, 156 (S.D.N.Y. 1997) ("personal benefit" inferred from tipper's testimony that he had been motivated by "ego" and personal "gratification"), *aff'd sub nom. SEC* v. *Warde*, 151 F.3d 42, 48-49 (2d Cir. 1998).[4]

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[4] A common jury instruction allows a benefit to be found from "maintaining a useful networking contact, improving [the tipper's] reputation, obtaining future financial or employment benefits, or just maintaining or furthering a friendship." *United States* v. *Riley*, ___ F. App'x ___, 2016 WL 158464 at *3 n.3 (2d Cir. Jan. 24, 2016) (unpublished). *Accord United States* v. *Whitman*, 904 F. Supp. 2d 363, 371 n.7 (S.D.N.Y. 2012).

The SEC and criminal prosecutors have not always been successful in persuading courts that an alleged friendship is sufficient to support an insider trading case, but even the defendants who ultimately prevailed have been subjected to extensive and expensive litigation. For example, in *SEC* v. *Anton*, the court rejected the SEC's contention that the alleged tipper, the Chairman of the Board of Directors of a company, had received a personal benefit from providing information to a former executive at the company. No. 06-2274, 2009 WL 1109324, at *9 (E.D. Pa. Apr. 23, 2009). The SEC asserted that the two were "friends" because they had known each other for thirty-five years and that the Chairman had once before invited the executive to his house for dinner, but the court determined that they were "not friends" and therefore, the Chairman was not liable under *Dirks*. *Id.* at *1 n.3, *9. See also *SEC* v. *Maxwell*, 341 F. Supp. 2d 941, 948 (S.D. Ohio 2004) ("Given the parties' relative stations in life, any reputational benefit to [a senior corporate executive] in the eyes of his barber is extremely unlikely to have translated into any meaningful future advantage."); *Newman*, 773 F.3d at 752 (shared alumni and church memberships did not confer a "benefit" because conviction requires "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature").

These published decisions—and the many enforcement actions that are resolved by settlement or plea without any extended judicial analysis[5] or by admini-

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[5] *Cf. Lafler* v. *Cooper*, 132 S. Ct. 1376, 1388 (2012) (observing that "criminal justice today is for the most part a system of pleas, not a system of trials").

strative adjudication[6]—are a natural outgrowth of liability theories that do little to illuminate what separates lawful from unlawful uses of material nonpublic information, and indeed suggest the difference is "not extensive," *Yun*, 372 F.3d at 1280, or even nonexistent. See *Blackwell*, 291 F. Supp.2d at 692.

Market professionals need far more guidance than this about how to ensure that their conduct remains aligned with the insider trading laws.

III. THE COURT CAN BEST DERIVE A CLEAR AND WORKABLE INSIDER TRADING RULE FROM THE BREACH OF DUTY FRAMEWORK THAT UNDERPINS *DIRKS*.

A. *Dirks* Grounded Tipping Liability In Established Principles Concerning Breach of Fiduciary Duty And Misappropriation Of Corporate Property.

The Court's decision in this case should build on its precedents holding that Section 10(b) does not impose any "general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Dirks*, 463 U.S. at 655 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 233 (1980)). "[R]ecipients of inside information do not invariably acquire a duty to disclose or abstain," *id.* at 659, but assume that duty only in circumstances that resemble breaches of fiduciary duty recognized by the common law.

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[6] *See, e.g.*, *Lohmann*, SEC Release No. 34-48092, 2003 WL 21468604, at *4 (S.E.C. June 26, 2003) (finding evidence of a personal benefit where the tipper and tippee were "friendly, if casual, office acquaintances" and the tipper stood to gain "the personal satisfaction of his generosity and the admiration" of a junior colleague).

Two firmly accepted principles underlie that approach. The first is that inside information belongs to the corporation and its shareholders, and not to any individual officer or employee. The second is that because a corporate insider owes fiduciary duties to the company, the insider may not derive "secret profits," *id.* at 654 (quoting *Cady, Roberts & Co.*, 40 S.E.C. 907, 916 n.31 (1961)), by trading on undisclosed information that is "intended to be available only for a corporate purpose." *Id.* at 654. Some early cases treated such trading as fraudulent, see *Cady, Roberts*, 40 S.E.C. at 911 n.13 (citing *Strong* v. *Repide*, 213 U.S. 419 (1909)), and "[a] significant purpose of the Exchange Act was to eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office." *Dirks*, 463 U.S. at 653 n.10 (quoting *Cady, Roberts*, 40 S.E.C. at 912 n.15).[7]

The prohibition on insider trading by tippees rests on fundamentally the same footing. "[T]ipping thus properly is viewed only as a means of *indirectly* violating" the rule that an insider who possesses material non-public information must either disclose that information or refrain from trading on it. *Dirks*, 463 U.S. at 659, 661 (emphasis added). Put another way, the tippee's liability is "derivative"; it arises only

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[7] A corporate outsider who receives material nonpublic information from a company or an insider and trades on the information in violation of a confidentiality undertaking or duty of trust and confidence to the source of the information has likewise been treated as guilty of fraud under the "misappropriation" theory; the conduct is treated as a fraud, carried out by a faithless fiduciary, and aimed at depriving the *source* of the information of its ownership of that information. *See United States* v. *O'Hagan*, 521 U.S. 642, 654-55 (1997) (Section 10(b)); *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) (mail and wire fraud).

where the tippee can be viewed as "a participant after the fact in the insider's breach of a fiduciary duty." *Id.* at 659, 661 n.20 (quoting *Chiarella*, 445 U.S. at 230 n.12).

This reasoning led the Court to reject the SEC's suggestion "that the antifraud provisions [of the securities laws] require equal information among all traders." *Id.* at 657. The rule, rather, is that "some tippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them *improperly*." *Id.* at 660.

B. The "Personal Benefit" Test Should Likewise Be Construed In Light Of Traditional Fiduciary Principles.

The "personal benefit" test was founded on this same understanding of the antifraud statutes and, accordingly, should be applied in a manner that similarly focuses on "whether the insider personally will benefit, directly or indirectly, from his disclosure," for "[a]bsent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach," and no violation of Section 10(b) by the tippee. See *id.* at 662.

To be sure, *Dirks* stated that a breach occurs not only where "the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings," *id.* at 663, but also "when an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664. But the Court had no occasion in *Dirks* to apply or define the latter portion of its test, relating to "gifts," that is at issue here.

In a business setting, a finder of fact should not be permitted to impose liability on the theory that a "gift" was made, and liability may follow, simply because a company insider provided material nonpublic information to an analyst or other market professional. That sort of standard would swallow the general rule, recognized in *Dirks*, that financial market professionals generally may work to "ferret out" non-public information, and generally may act on the basis of such information, if it comes into their possession. *Id.* at 658.

Nor should liability be permitted to rest on the fact that an analyst or other market professional has developed casual social ties to the tipper. People seldom interact on a regular basis without developing some degree of acquaintance or familiarity, but that fact alone does not warrant an inference that every disclosure is meant to be a "gift" to the tippee. That approach, too, threatens to swallow the general rule of *Dirks*, and to leave market participants without any meaningful "guiding principle," *id.*, at 664, as to where liability lies. In these situations, *Newman* surely had it right that acquaintance or familiarity or even some degree of "friendship" should not justify an inference that there has been a "gift" absent a relationship that is "meaningfully close" and that "generates an exchange that is objective, consequential and [that] represents at least a potential gain of a pecuniary or similarly valuable nature." 733 F.3d at 452. And under *Dirks*, the closeness of the relationship and the significance of the exchange must be established by "objective criteria." *Dirks*, 463 U.S. at 663.

In the business setting, such criteria could include evidence that shows that "the insider, by giving the information out selectively, is in effect selling the

information to its recipient for cash, reciprocal information, or other things of value for himself." *Id.* at 664 (quoting Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 348 (1979)). Evidence that the tipper shared the information (or was willing to share the information) with others who provided nothing in "exchange" would tend to undermine the inference of "personal gain." But whatever the specific evidence in the case, the inquiry should at bottom look to the character of the exchange, and whether the insider seeks ultimately to extract pecuniary value for the disclosure.

Though SIFMA does not take a position on the proper application of the *Dirks* standard to the facts of this case, the same core principle should govern in the family setting. Something more than the mere fact of a family relationship should be required, contrary to the SEC's recent suggestion that, for example, "[f]irst cousins have sufficient consanguinity to be meaningfully close as a matter of law." Brief of the SEC at 33 n.13 in *SEC* v. *Holley*, No. 15-3457 (3d Cir. filed Apr. 20, 2016). In fact, many persons who are related by blood or marriage are not aware of each other; many others are estranged or hostile. The evidence establishing liability under the "gift" theory in the family setting might demonstrate a history of reciprocal favors, mutual dependence and shared economic circumstances to the extent that it may fairly be inferred that a benefit nominally realized by a tippee family member accrues to the benefit of the tipper and possibly other family members. On the other hand, it would (as above) contradict such an inference if the tipper had shared the information (or was willing to share the information) with persons

who are not family members and provided no other reciprocal benefit.

Making clear that tipping liability cannot rest on relationship status alone would greatly clarify the law of tippee liability, particularly as applied to business settings. For one, it would have the laudable effect of freeing the lower courts from their current focus on matters like whether the tipper and tippee were "friends," as evidenced by ties like whether "two individuals were alumni of the same school or attended the same church," see *Newman*, 773 F.3d at 452. As demonstrated in Part II, *supra*, inquiries like these have produced inconsistent results across cases, in no small measure because there is no federal common law of friendship, and thus no firm guideposts for courts to follow. It would be appropriate instead to make clear that insider trading cases brought under a "gift" theory must operate within the "solid core" of Section 10(b) and Rule 10b-5, cf. *Skilling*, 561 U.S. at 407, and thus must likewise focus on the character of the exchange and rest ultimately on proof that the tipper obtained pecuniary value for the information disclosed.

Second, such a holding would make it much easier for market professionals to know whether their conduct complies with the law. No one should be required to guess at whether the SEC, a prosecutor or a jury would think that the threshold for an actionable friendship is two meals or four, or membership in the same or adjoining college class years. But market professionals can be fairly required to ask and answer a more targeted question: Would the person who provided this information benefit in any pecuniary sense if his or her intended recipient used the information to make a profit? Ties of friendship or blood or marriage might in some

circumstances be *relevant* to that more targeted question. But rather than resting liability on the slender reed of a third party's abstract understanding of friendship or family ties, the analysis should turn more concretely on whether the insider is, in one respect or another, lining his own pocket by disclosing the information. What was true at the time of *Dirks* remains true today: "'It is important in this type of case to focus on policing insiders and what they do . . . rather than on policing information *per se* and its possession.'" *Dirks*, 463 U.S. at 662-63 (quoting *In re Investors Mgmt. Co.*, 44 S.E.C. 633, 648 (1971) (Commissioner Smith, concurring in result)).

Third, a targeted inquiry into the insider's potential for personal benefit would provide additional clarity in cases such as *Newman*, in which the defendant is the remote recipient of information, many conversations removed from the original tip. The defendant might know whether the insider and the first tippee went to college or play golf or sing in a choir together, but in ordinary life no one draws nefarious conclusions from such commonplace ties. Rather than asking whether the ultimate tippee knew innocuous facts like these, courts can come more quickly and decisively to the point by asking whether the trader had sufficient knowledge that the insider would benefit in monetary terms as a result of profits earned by a direct or remote tippee.[8]

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[8] While the standard for knowledge or conscious avoidance is not directly in issue (including the question, long reserved by this Court, of whether recklessness is an adequate basis for Section 10(b) civil liability), the personal benefit requirement is closely connected to the distinct question of the tippee's knowledge of the breach of duty. *See Dirks*, 463 U.S. at 660-61 & n.19. Indeed, the government has recognized in *Newman* and elsewhere that the two issues are intertwined, sometimes

Finally, the approach suggested here would square with Congress's apparent ratification of the basic understanding that insider trading consists of a breach of duty by an insider, as motivated by an opportunity to obtain a personal benefit. Congress specifically addressed insider trading twice in the years immediately following *Dirks*,[9] yet it chose not to disturb the *Dirks* approach at a time when other developed markets were statutorily eliminating the requirement of a breach of duty.[10] See *SEC* v. *Clark*, 915 F.2d 439, 451-53 (9th Cir. 1990) (treating 1984 and 1988 insider trading enactments as Congressional ratification of "misappropriation" theory); see also *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (noting that "[t]he principle

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contending that the tippee's knowledge can be shown simply by the quality of the information disclosed. *See* Petition for Certiorari at 30, *United States* v. *Newman*, No. 15-137; *cf.*, *Yun*, 327 F.3d at 1280. But many of the controversies over the government's methods for proving knowledge are consequences of the ambiguity of the "personal benefit" in the first place. If tipping cases are limited to those in which the benefit is objective and concrete, the government will need to rely on fewer substitutes for proving knowledge (if it can prove it at all), and it will have less reason to ask courts and juries to accept unwarranted inferences; thus, administration of this aspect of tipping cases can be greatly simplified.

[9] *See* Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264; Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677.

[10] For example, not long after *Dirks*, European officials adopted insider trading rules that prohibit recipients of undisclosed corporate information from trading on their special knowledge, regardless of whether the insider has sought to gain from the disclosure. *See* Council Directive Coordinating Regulations on Insider Dealing, Council Directive 89/592, *Coordinating Regulations on Insider Trading*, 1989 O.J. (L 334) 30. Congress has not chosen that path.

of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done"). If the application of the insider trading laws to tippees is to shift away from the *Dirks*-endorsed foundation in principles of fiduciary duty and corporate misappropriation, any such change should be initiated by Congress. The legislature is far better positioned than the courts to weigh the potential virtues and drawbacks of competing insider liability standards and, in adopting any amendments, to provide the clarity that has been absent from enforcement actions predicated on vague and shifting understandings of how friendships are formed and maintained—a subject that is generally foreign to the securities laws, and has no natural place within them.

CONCLUSION

The Court should once again recognize the significant contribution that analysts and other market professionals make to the efficiency of the securities markets, including by "meeting with and questioning corporate officers and others who are insiders," *Dirks*, 463 U.S. 658, and should reaffirm that those who receive company information may act on that information unless they are aware that a tipper disclosed the information in order to obtain a personal benefit of a "pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452.

Respectfully submitted,

A. ROBERT PIETRZAK
JOSEPH MCLAUGHLIN
DANIEL A. MCLAUGHLIN
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, N.Y. 10019
(212) 839-5300

CARTER G. PHILLIPS*
KWAKU A. AKOWUAH
REBECCA S. LEVENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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